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Supreme Court, U.S.
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No. 04-

IN THE

# Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
*Petitioner,*

v.

THE UNITED STATES,
*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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January 5, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1961(c)(2), which directs the United States to pay interest on "all final judgments of the United States Court of Appeals for the Federal [C]ircuit," unambiguously waives the government's sovereign immunity from suits for post-judgment interest on all Federal Circuit judgments, rather than merely those that the United States unsuccessfully appeals to this Court, where any other reading of § 1961(c)(2) would render it entirely superfluous?

2. Whether Congress can unambiguously waive the government's sovereign immunity from suits for post-judgment interest in 28 U.S.C. § 1961(c)(2) even though it has not yet unambiguously appropriated money to pay any such claim for interest that might arise?

## PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 29.6, petitioner Mobil Oil Exploration & Producing Southeast, Inc. states that it is a direct subsidiary of Mobil Exploration & Producing North America Inc., and an indirect subsidiary of both Mobil Corporation and Exxon Mobil Corporation (NYSE: XOM).

Marathon Oil Company was a party in the court below but is not a party to this petition. Marathon Oil Company is a direct subsidiary of Marathon Oil Corporation (NYSE: MRO).

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## PETITION FOR CERTIORARI

Petitioner Mobil Oil Exploration & Producing Southeast, Inc. ("MOEPSI") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

## OPINIONS BELOW

The order of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc is unreported and is reprinted in the Appendix to this Petition ("App.") at 52a-53a. The underlying opinion of the court of appeals is reported at 374 F.3d 1123 (App. 1a-33a). The Court of Federal Claims's order and opinion dismissing MOEPSI's complaint is reported at 56 Fed. Cl. 768 (App. 34a-51a).

## STATEMENT OF JURISDICTION

The opinion of the court of appeals was entered on June 30, 2004, and the order of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc was entered on October 7, 2004. This Court has jurisdiction pursuant to 28 U.S.C § 1254(1).

## STATUTES INVOLVED

The petition involves the following the provisions of the U.S. Code: 28 U.S.C. §§ 1961 and 2516(b), and 31 U.S.C. § 1304. The pertinent text of these provisions is set forth at App. 54a-58a.

## INTRODUCTION

This is the second chapter in a dispute between MOEPSI and the federal government over off-shore oil and gas exploration leases that MOEPSI purchased from the government. In the first chapter, this Court, reversing the

Federal Circuit, held that the federal government was required to pay restitution to MOEPSI for breaching the lease agreements. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 624 (2000) (ordering the government to "give the companies their money back"). The government did not immediately give MOEPSI its money back, and this, the second chapter, involves whether the federal government is required to pay interest to MOEPSI for delaying payment for several months after the litigation had finally ended in the Federal Circuit on remand from this Court.

In order to waive the government's immunity from suits for post-judgment interest, this Court has held that Congress must unambiguously authorize payment of such interest apart from authorizing payment for the principal. This requirement was satisfied in this case. There is a statute that directs the government to pay interest on "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit," 28 U.S.C. § 1961(c)(2).

With one judge dissenting, the Federal Circuit, however, held that § 1961(c)(2) was not unambiguous. Specifically, the court held that, even though the text of §1961(c)(2) authorized interest on "all final judgments," there was a plausible reading of the statute that it authorized post-judgment interest only for judgments of the Federal Circuit unsuccessfully appealed to this Court by the government. The court acknowledged that its alternative reading of § 1961(c)(2) rendered the statute superfluous because there is another provision of Title 28 that already authorizes interest on such judgments. See *id.* § 2516(b). The court nonetheless held that "redundancy in statutory provisions is insufficient to transform a plausible reading into an implausible one." App. 16a. This holding conflicts with this Court's decision in *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 35-36 (1992) (holding that a reading of a statutory waiver of sovereign immunity was implausible because it rendered

statute superfluous), as well as every other court of appeals that has confronted the question.

In addition, although the issue had been neither briefed nor argued by the parties, the Federal Circuit also held that Congress had not waived the government's immunity in this case because Congress has not already made an unambiguous appropriation to pay MOEPSI's claim for interest. The court held that "[t]here can be no unequivocal waiver of sovereign immunity for post-judgment interest . . . if Congress has not clearly appropriated funds with which the government can pay the interest." App. 17a. As the government's own manual of appropriations explains, however, the notion that Congress does not waive the government's immunity from suit without first making an unambiguous appropriation is at odds with the fact that, for over one hundred years, the federal government authorized litigants to file suit against it without *ever* appropriating money to pay those judgments beforehand. During this time, Congress typically appropriated money only on an individual basis by private bill. It is for this reason that a plurality of this Court explicitly rejected the Federal Circuit's view in *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-71 (1962). It is also why two other court of appeals decisions (including one written by then-Judge Ruth Bader Ginsburg) have rejected its view as well (forming a 2-2 circuit split on this question).

Although none of these conflicting decisions dealt with the particular statute at issue in this case—28 U.S.C. § 1961(c)(2)—this is because the Federal Circuit has exclusive jurisdiction over almost all suits for interest against the federal government under this statute. As a result, it is highly unlikely that a circuit split will ever arise specifically with respect to § 1961(c)(2); and, unless the Federal Circuit voluntarily revisits its decision in the future, this petition may be the last chance this Court has to resolve the meaning of this statute. Moreover, if the Federal Circuit's reading is not corrected, the government will be able to delay paying

judgments duly entered against it with impunity. This result is not only unfortunate for those wronged by the government, but it is intolerable in light of the clear congressional command to the contrary in § 1961(c)(2). This Court should grant this petition, and then reverse the Federal Circuit.

## STATEMENT OF THE CASE

1. In 1981, MOEPSI paid the United States more than $78 million in cash up-front for interests in oil and gas leases sold under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1301 *et seq.*, for five tracts off the coast of North Carolina. In exchange, "the United States promised the companies, among other things, that they could explore for oil off the North Carolina coast and develop any oil that they found . . . provided that the[y] . . . received exploration and development permissions in accordance with various statutes and regulations" that were incorporated into the lease contracts. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 609 (2000).

In 1990, the United States enacted the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (1990), which substantially altered the statutory scheme for issuance of the permits required for MOEPSI to explore for and develop oil and gas on its lease tracts. The OBPA thus not only repudiated the government's obligations under MOEPSI's lease, but also "compelled governmental breach by non-performance." *Conoco, Inc.* v *United States*, 35 Fed. Cl. 309, 327 (1996); *accord Mobil*, 530 U.S. at 620. In 1992, MOEPSI, along with the owners of other OCSLA leases, joined a lawsuit against the United States for breach of the leases. MOEPSI did not seek expectation damages; instead, it merely sought restitution of the $78 million it had paid up front nearly 10 years earlier.

In April 1996, the Court of Federal Claims found the United States liable for breach of the lease contracts, *Conoco*,

35 Fed. Cl. at 337, and awarded MOEPSI some $78 million in damages. Although the Federal Circuit reversed this decision, see *Marathon Oil Co.* v. *United States*, 177 F.3d 1331 (Fed. Cir. 1999), this Court reversed again, holding that, because it had repudiated and breached its contracts with MOEPSI and the other companies, the government was required to pay restitution; *i.e.*, "must give the companies their money back." *Mobil*, 530 U.S. at 624.

2. The government did not immediately "give the companies their money back." Instead, on remand to the Federal Circuit, the government continued fighting the restitution award. On December 28, 2000, the Federal Circuit rejected the last of the government's arguments, and affirmed the original Court of Federal Claims judgment for MOEPSI in the amount of $78,257,565. The government's petition for panel rehearing was denied on February 16, 2001. The government did not seek rehearing en banc or Supreme Court review.

The government finally paid the amount it owed to MOEPSI by wire transfer on May 1, 2001—more than 4 months after the Federal Circuit had entered its final judgment on remand, and nearly a full year after the Supreme Court had directed that "the Government must give the companies their money back." The government's payment, however, did not include any amount either for post-judgment interest or for the time value of MOEPSI's money.

Accordingly, on June 8, 2001, MOEPSI submitted a demand letter to the Judgment Fund Group of the United States Department of the Treasury requesting payment of post-judgment interest on the Federal Circuit's December 28, 2000, judgment. MOEPSI noted that 28 U.S.C. § 1961(c)(2) provides for interest on "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit," at the rate specified in 28 U.S.C. § 1961(a), computed daily from December 28, 2000, the date of the judgment, through May 1, 2001, the date of payment,

as provided by 28 U.S.C. § 1961(b). MOEPSI further noted that Congress appropriated money to pay these sums in 31 U.S.C. § 1304(a).

On August 28, 2001, MOEPSI received a letter from the United States Department of Justice, acting on behalf of the Department of the Treasury, denying its demand for post-judgment interest. That letter stated the government's position that "the government has only waived sovereign immunity to interest upon a judgment of the . . . Federal Circuit when the Supreme Court has affirmed the judgment upon petition by the United States," and that MOEPSI was not entitled to interest because the government had not unsuccessfully appealed the Federal Circuit's judgment to this Court.

3. MOEPSI filed this lawsuit in the Court of Federal Claims on February 5, 2002, seeking to recover $1.5 million in post-judgment interest under 28 U.S.C. § 1961(c)(2) for the period from December 28, 2000, through May 1, 2001.[1] The Court of Federal Claims had jurisdiction to hear this suit pursuant to 28 U.S.C. § 1491. On May 8, 2002, the government moved to dismiss the suit under Court of Federal Claims Rule 12(b)(1) for lack of jurisdiction. On June 19, 2003, the Court of Federal Claims granted the government's motion. The Federal Circuit affirmed, with Judge Prost dissenting.

The Federal Circuit noted that the government is liable on a claim for post-judgment interest only if Congress has unambiguously waived the government's sovereign immunity from a claim for interest separately from a claim for the principal. App. 4a. Although the court acknowledged that § 1961(c)(2)'s instruction that "interest shall be allowed" on "all final judgments" of the Federal Circuit appeared to authorize the post-judgment interest in this case, the court held that § 1961(c)(2) was ambiguous because there was another plausible reading of the statute. *Id.* at 14a-17a. In

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[1] The suit was joined by Marathon Oil Company, which is not a party to this petition.

particular, the court held that it was plausible to read § 1961(c)(2) to authorize interest, not, as it says it does, on "all final judgments" of the Federal Circuit, but, rather, only on judgments of the Federal Circuit that have been unsuccessfully appealed to this Court by the government (of which MOEPSI's judgment is not one). *Id.*

The court based this reading on a later clause in § 1961(c)(2), which directs that the interest authorized on "all final judgments" should be *calculated* "at the rated provided in subsection (a) and as provided in subsection (b)." Subsection (b), in turn, directs that "[i]nterest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually." 28 U.S.C. § 1961(b). Section 2516(b) authorizes interest on judgments of the Federal Circuit that the government unsuccessfully appealed to this Court. See *id.* § 2516(b). Section 1304(b) sets forth the period over which Congress has appropriated money to pay interest on such judgments. See 31 U.S.C. § 1304(b)(1)(B), (b)(2). Although the Federal Circuit acknowledged that § 1961(b)'s reference to these provisions appeared simply to provide an exception to the general rules of computing interest for a subset of Federal Circuit judgments not at issue in this case, the court nonetheless concluded that it was plausible to read § 1961(b) also to limit the broad authorization of interest in § 1961(c)(2) to the same instances in which it is already authorized in § 2516(b)—that is, judgments of the Federal Circuit unsuccessfully appealed to this Court by the government. App. 11a, 15a-16a.

The Federal Circuit conceded that this reading rendered § 1961(c)(2) superfluous because interest on such judgements is already authorized by § 2516(b). Nonetheless, the court held that "redundancy in statutory provisions is insufficient to transform a plausible reading into an implausible one." App. 16a. The court asserted that it was plausible that Congress had been redundant in order to provide an "overview." *Id.*

This was all the more true, the court held, because there were other superfluous provisions of § 1961—namely § 1961(c)(3) and (c)(4)—which the court said were "redundant in light of ordinary plain-meaning principles of statutory interpretation, and strict-construction principles of sovereign immunity."[2] *Id.*

In order to buttress its holding, the Federal Circuit also delved into an issue that had been neither briefed nor argued, and gave a second reason for its holding that the statute was ambiguous. The court held that, "even if the language of . . . section 1961 were, hypothetically, crystal clear," App. 19a, Congress *still* had not waived the government's immunity from suit because it had not already *unambiguously* appropriated money to pay any resulting judgment. *Id.* at 17a-24a. The court held that "the scope of the appropriation . . . is jurisdictional in nature," *id.* at 18a. Thus, "[t]here can be no unequivocal waiver of sovereign immunity for post-judgment interest . . . if Congress has not *clearly* appropriated funds with which the government can pay the interest." *Id.* at 17a (emphasis added). Although the court acknowledged that there was a plausible argument that Congress's permanent appropriation for paying judgments—the "Judgment Fund," 31 U.S.C. § 1304—included money for MOEPSI's post-judgment interest in § 1304(a), the court held that this was not sufficient to vest the federal courts with jurisdiction to hear this suit because the appropriation statute was not "unambiguous" on this point. App. 24a-28a; *accord id.* at 27a ("[T]o succeed, [MOEPSI's] reading [of the appropriation statute] must be unequivocally the proper reading.");

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[2] Although the court noted that its view was also consistent with one reading of the legislative history, the court correctly held that, due to the doctrine that waivers of sovereign immunity must not be ambiguous, as well as the doctrine that courts turn to legislative history only when the statutory text is ambiguous, the legislative history in this case is irrelevant. App. 28a. *See United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) ("[L]egislative history has no bearing on the ambiguity point.").

*id.* at 27a (holding sovereign immunity not waived because the appropriation statute is "ambiguous"). The court acknowledged that its conclusion conflicted with the holdings of two other courts of appeals, including an opinion written by then-Judge Ruth Bader Ginsburg. *Id.* at 20a-24a.

Judge Prost dissented. With respect to the court's reading of § 1961(c)(2), she noted that it "violate[d] a central canon of statutory construction" to accept as plausible a reading of § 1961(c)(2) that renders the words of that section superfluous. App. 32a. She further noted that it did violence to the statutory text to read the word "all" in "all final judgments" to mean only a small subset of final judgments. As she put it, "'all' means 'all.'" *Id.* at 31a. It also did violence to the statutory text, she noted, to transform the reference to § 2516(b) in § 1961(b) from the exception into the rule. As she put, "'except' means 'except.'" *Id.*

With respect to the court's holding that there can be no waiver of sovereign immunity without an unambiguous appropriation, she doubted than an ambiguous appropriation could "trump a clear waiver of sovereign immunity in another statute." App. 32a. She also noted that the government had neither argued nor even raised the issue, and that the court's holding conflicted with other courts of appeals. *Id.*

MOEPSI filed a petition for rehearing and suggestion for rehearing en banc, which was denied on October 7, 2004. App. 52a-53a.

## REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision in this case rests on two legal propositions that are in direct conflict with decisions by this Court as well as with decisions by other courts of appeals.

1. The first of these propositions—that a statutory waiver of sovereign immunity is ambiguous if the competing reading renders the statute superfluous—is in direct conflict with this

Court's decision in *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (rejecting as implausible one possible interpretation of a statutory waiver of immunity because it "violate[d] the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"), and with the decision of every other court of appeals that has addressed the question.

2. The second of these propositions—that Congress cannot waive the government's immunity from suit unless it has already also unambiguously appropriated money to pay any judgment that might arise—is perhaps even more troubling. To be sure, this proposition is certainly inconsistent with this Court's uncontradicted plurality decision in *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-71 (1962) (deciding that lack of an appropriation does not divest courts of jurisdiction to hear suits against the government for which sovereign immunity is otherwise waived), as well as two courts of appeals decisions that have squarely rejected the Federal Circuit's use of the Judgment Fund statute to undermine a statutory waiver of sovereign immunity (now forming a 2-2 circuit split). But, perhaps even more important, and as explained by the government's own manual of appropriations, the Federal Circuit's decision is inconsistent with the way in which Congress has waived the government's immunity from the very beginning of that practice 150 years ago. For most of that time, Congress never appropriated money to pay a claim it had authorized until after a judgment had been rendered and the claimant applied for a private bill from Congress. Under the Federal Circuit's holding, the traditional route of seeking a private bill for payment of a claim the government had authorized is now closed for good. And, although two courts of appeals disagree, because the Federal Circuit hears the vast majority of claims against the government, this means that the historical ability to seek a private bill is now closed for good for pretty much everyone.

It is true that none of these circuit splits deal specifically with the statute at issue in this case, 28 U.S.C. § 1961(c)(2), but it is very unlikely that there will ever be a circuit split on the meaning of this statute because the Federal Circuit has exclusive jurisdiction over all but the most insignificant suits against the government for interest. See *id.* § 1346(a)(2) (conferring jurisdiction on district courts concurrent with that of the Court of Federal Claims only for claims "not exceeding $10,000"). For this reason, this Court has not hesitated to grant petitions for writs of certiorari to the Federal Circuit in cases that do not conflict with other courts of appeals.[3] See Robert L. Stern et al., *Supreme Court Practice* § 4.21 (8th ed. 2002). Moreover, for the very same reason, unless the Federal Circuit voluntarily revisits its holding in this case at some point, this petition may very well be the only chance this Court will have to review whether Congress meant what it said when it allowed litigants to recover interest on Federal Circuit judgments when the government—in good faith or bad—takes its time to pay.

## I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY THIS COURT AND BY OTHER COURTS OF APPEALS HOLDING THAT A STATUTORY WAIVER OF SOVEREIGN IMMUNITY IS NOT AMBIGUOUS IF THERE IS ONLY ONE READING THAT DOES NOT RENDER THE STATUTE SUPERFLUOUS.

Congress waives the government's immunity from suit for post-judgment interest whenever it unambiguously authorizes the payment of interest on judgments against the government. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986).

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[3] *See, e.g.*, *United States* v. *Navajo Nation*, 535 U.S. 1111 (2002); *United States* v. *White Mountain Apache Tribe*, 535 U.S. 1016 (2002); *Franconia Assocs.* v. *United States*, 534 U.S. 1073 (2002); *Marathon Oil Exploration & Producing Southeast, Inc.* v. *United States*, 528 U.S. 1002 (1999); *Winstar Corp.* v. *United States*, 516 U.S. 1087 (1996); *Hercules, Inc.* v. *United States*, 514 U.S. 1049 (1995).

Section 1961(c)(2) authorizes the payment of interest on "all final judgments" of the Federal Circuit. 28 U.S.C. § 1961(c)(2). There is nothing ambiguous about this language. The Federal Circuit concluded otherwise only by crediting as plausible an interpretation of § 1961(c)(2) that reads that provision out of the U.S. Code by rendering it entirely superfluous, a holding that conflicts with a decision by this Court as well as decisions by other courts of appeals.

### A. Section 1961(c)(2) Is Not Ambiguous.

The statute at issue in this case provides as follows:

> [I]nterest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit, at the rate provided in subsection (a) and as provided in subsection (b).

28 U.S.C. § 1961(c)(2) (footnote omitted). There is nothing ambiguous about this language. It directs that interest "shall be allowed" on "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit." This Court has said that nearly identical language unambiguously waives the government's immunity from post-judgment interest in Internal Revenue cases. See *Shaw*, 478 U.S. at 318 & n.6 (noting that Congress unambiguously waived immunity with respect to interest in 28 U.S.C. § 2411, which provides that "interest shall be allowed" on judgments "against the United States").

The remainder of § 1961(c)(2) simply sets forth the manner in which the authorized interest is to be computed. It directs that the authorized interest is calculated "at the rate provided in subsection (a) and as provided in subsection (b)." These subsections simply establish the rates, accrual periods, and compounding methods applicable to the interest authorized by subsection (c)(2). Subsection (a), for example, sets the interest rate "equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System[] for the calendar

week preceding[] the date of the judgment." 28 U.S.C. § 1961(a) (footnote omitted). Similarly, subsection (b) sets the accrual period and compounding method for the interest computation as follows:

> Interest shall be *computed* daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be *compounded* annually.

*Id.* § 1961(b) (emphasis added). In other words, unless the judgment falls within one of the exceptions listed in subsection (b)—cases falling under 28 U.S.C. § 2516(b) or 31 U.S.C. § 1304(b)—the interest authorized by § 1961(c)(2) is paid from the date of judgment "to the date of payment" and is "compounded annually."

The exceptions referenced in subsection (b) pertain to cases in which the government lost before the Federal Circuit, successfully petitioned for a writ of certiorari, and then lost again before this Court. See 28 U.S.C. § 2516(b) (setting interest rate "on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States"); 31 U.S.C. § 1304(b)(1)(B) (modifying accrual period for interest "on a judgment of the Court of Appeals for the Federal Circuit . . . under section 2516(b) of title 28"). In these circumstances, rather than from the date of judgment through the date of payment, interest accrues from "the date of filing of the transcript of the judgment with the Secretary of Treasury through the day before the date of the [Supreme Court's] mandate of affirmance," *id.* § 1304(b)(1)(B), except that interest "is not allowed after the end of the [Supreme Court] term in which the judgment is affirmed," *id.* § 1304(b)(2). The interest rate in these circumstances is now the same as that applicable to the cases in which the exceptions do not apply. Compare 28 U.S.C. § 2516(b), with *id.* § 1961(a).

This case is not one in which the government lost in the Federal Circuit and then also lost in this Court on a petition for writ of certiorari filed by the government. Accordingly, the plain and unambiguous language of § 1961(c)(2) authorizes interest "against the United States" on the "final judgment[]" of the Federal Circuit from the date of that judgment "to the date of payment"—precisely the period of interest MOESPI seeks in this case. The government has therefore waived its sovereign immunity from this suit, and the Court of Federal Claims was incorrect to dismiss this suit for lack of jurisdiction.

### B. This Court And Several Other Courts Of Appeals Have Already Decided That Any Other Reading Of Section 1961(c)(2) Is Implausible Because It Would Render The Statute Superfluous.

The Federal Circuit held that that § 1961(c)(2) was ambiguous because the reference in that provision to 28 U.S.C. § 1961(b), and § 1961(b)'s references to 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b), could be construed to limit the authorization of interest in § 1961(c)(2) to the same circumstances in which interest is already authorized in § 2516(b) and § 1304(b)—judgments of the Federal Circuit that the government unsuccessfully appealed to this Court. App. 18a.

As this Court held in *Nordic Village*, 503 U.S. at 37, a statutory waiver of sovereign immunity is ambiguous only if there is more than one "plausible" reading of the statute. The Federal Circuit's alternative reading is simply not plausible.

The most obvious problem with the Federal Circuit's reading is that it writes § 1961(c)(2) entirely out of the U.S. Code by rendering it superfluous.[4] The Federal Circuit

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[4] The Federal Circuit also erred in reading § 1961(b)'s references to § 2516(b) and § 1304(b) to limit the interest authorized in § 1961(c)(2) to

conceded this, but held that "redundancy in statutory provisions is insufficient to transform a plausible reading into an implausible one." App. 16a. This holding directly conflicts with a decision of this Court as well as decisions by other courts of appeals.

It is "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys* v. *United States*, 485 U.S. 759, 778 (1988) (plurality). This Court applied the rule against redundancy to a statutory waiver of sovereign immunity in *Nordic Village*. In that case, this Court considered whether a provision of the bankruptcy code unambiguously waived the government's immunity from an action seeking monetary recovery. 503 U.S. at 35-36. In determining whether there was more than one "plausible" reading of the statute, this Court *rejected as implausible* one possible interpretation because it "suggested no function to be performed" by the statutory language, and, therefore, "violate[d] the settled rule that a statute must, if

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the circumstances described in § 2516(b) and § 1304(b). Not only does § 1961(b) by its plain terms refer only to the *method of computation* of interest otherwise authorized, but the references to § 2516(b) and § 1304(b) are an *exception* to the general rule of computation set forth therein. *See* 28 U.S.C. § 1961(b) ("Interest shall be *computed* daily to the date of payment *except* as provided in section 2516(b) of this title and section 1304(b) of title 31 . . . ." (emphasis added)). As Judge Prost noted in dissent, the Federal Circuit's reading transforms the exception into the rule. App. 31a.

Nor is there anything in § 2516(b) or § 1304(b) that purports to limit the authorization of interest *only* to the circumstances described in those subsections. Those subsections simply describe how interest is calculated *in the event* the judgment of the Federal Circuit was unsuccessfully appealed to this Court by the government.

Thus, in addition to rendering the statute superfluous, the Federal Circuit's alternative reading is also quite strained. This makes it all the more implausible. *See Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476-77 (2003) ("[W]e should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous.").

possible, be construed in such fashion that every word has some operative effect." *Id.* at 36. The Federal Circuit's holding in this case that an interpretation of § 1961(c)(2) that gives no "operative effect" whatsoever to any of its words is a plausible reading of the statute simply cannot be reconciled with this Court's decision in *Nordic Village*. See also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987) ("[N]o reasonable reading of these provisions together can lead to this conclusion, for petitioner's view renders § 1920 superfluous.").

Moreover, every other court of appeals to confront the question whether a superfluous reading of a statute renders it ambiguous has disagreed with the Federal Circuit's view that it does, both within the context of waivers of sovereign immunity, see, *e.g.*, *Ortloff* v. *United States*, 335 F.3d 652, 659 (7th Cir. 2003) (finding unambiguous waiver of sovereign immunity because government's competing interpretation "would render superfluous" statutory language), *cert. denied*, 540 U.S. 1225 (2004); *Kaffenberger* v. *United States*, 314 F.3d 944, 953 (8th Cir. 2003) (finding unambiguous waiver of sovereign immunity because government's competing interpretation "renders the above quoted portion of [the statute] insignificant, if not wholly superfluous" (internal quotation marks omitted)), as well as in other contexts, see, *e.g.*, *United Steelworkers of Am., AFL-CIO-CLC* v. *North Star Steel Co.*, 5 F.3d 39, 42-43 (3d Cir. 1993) (holding that statute was not ambiguous because the competing reading would violate "the rule of statutory construction that requires us to avoid constructions that render statutory provisions superfluous").

The Federal Circuit asserted that it was plausible to read § 1961(c)(2) to be superfluous because it concluded that two other provisions of § 1961 were superfluous as well. App.

16a. In particular, the court asserted that § 1961(c)(3)[5] and (c)(4)[6] are "redundant in light of ordinary plain-meaning principles of statutory interpretation, and strict-construction principles of sovereign immunity," *id.* Although these provisions do restate such "principles," there is nothing redundant about Congress codifying *judge-made rules* of sovereign immunity or statutory interpretation, as these provisions do.[7] Judge-made rules of sovereign immunity are subject to change by judges at any time, and not all judges subscribe to the same rules of statutory interpretation.[8] Unlike the court's interpretation of § 1961(c)(2), these provisions do not restate *other provisions of the U.S. Code*, which is the only context in which the rule against redundancy is operative.

In any event, even if other provisions of § 1961 were in some sense unavoidably superfluous, this was no excuse to credit a superfluous reading § 1961(c)(2) where a non-superfluous reading is readily available. See *Nordic Village*, 503 U.S. at 36 (holding that "a statute must, *if possible*, be

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[5] "Interest shall be allowed . . . on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law." 28 U.S.C. § 1961(c)(3).

[6] "This section shall not be construed to affect the interest of any judgment of any court not specified in this section." 28 U.S.C. § 1961(c)(4).

[7] Paragraph (c)(3) codifies the judge-made rule that the federal government is not liable for interest unless Congress specifically waives immunity for such interest. *See Shaw*, 478 U.S. at 315-16. Paragraph (c)(4) codifies the judge-made rule that statutes should be construed in accordance with their plain text. *See, e.g., Till* v. *SCS Credit Corp.*, 124 S. Ct. 1951, 1964-65 (2004) (plurality).

[8] For this reason, one commentator has recommended that Congress completely codify the particular rules of statutory interpretation that it wishes judges to follow. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002).

construed in such fashion that every word has some operative effect." (emphasis added)).

## II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THIS COURT AS WELL AS DECISIONS BY OTHER COURTS OF APPEALS HOLDING THAT AN APPROPRIATION IS NOT NECESSARY IN ORDER FOR CONGRESS TO WAIVE THE GOVERNMENT'S IMMUNITY AND VEST THE FEDERAL COURTS WITH JURISDICTION.

Although this issue had not been briefed nor even argued by the parties, the Federal Circuit also held that § 1961(c)(2) did not unambiguously authorize interest on the judgment in this case because Congress has not already unambiguously appropriated funds to pay that interest. The Federal Circuit acknowledged that MOEPSI might have a plausible argument that Congress had appropriated funds to pay its post-judgment interest claim, see 31 U.S.C. § 1304(a) ("Necessary amounts are appropriated to pay . . . interest and costs . . . otherwise authorized by law . . . ."), but held that the Court of Federal Claims nonetheless lacked jurisdiction over the suit because the appropriation was ambiguous. The court thus conflated (1) the question whether Congress had waived the government's immunity from suit with (2) the question whether Congress had appropriated money to pay the resulting judgment. By doing so, the court upset a 150-year practice where litigants could first ask a court to enter judgment against the government, and then ask Congress to pay the judgment by passing a private bill. The Federal Circuit's decision also conflicts with a decision of a plurality of this Court, as well as decisions by two other courts of appeals, forming a 2-2 circuit split.

### A. The Federal Circuit's Decision Is A Radical Departure From 150 Years Of Practice Against The Government.

As the Federal Circuit noted, App. 17a, the Appropriations Clause of the Constitution prohibits money from being withdrawn from the Treasury without statutory appropriation. U.S. Const., art. I, § 9, cl. 7. Today, most of the claims against the government are paid out of a preexisting permanent appropriation found in the Judgment Fund statute, 31 U.S.C. § 1304. For most of this country's history, however, Congress did not appropriate funds to pay a judgment against the government until after the judgment had been rendered.

Congress has been authorizing suits against the government since the middle of the 19th century. See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 690 (1985) (noting waivers for contract claims as early as 1863, and then the Tucker Act in 1887, patent claims in 1910, negligence claims in 1946, and copyright claims in 1960). Nonetheless, Congress did not create the Judgment Fund until 1956. See Supplemental Appropriation Act, 1957, Pub. L. No. 84-814, ch. XIII, 70 Stat. 678, 694-95 (1956). Prior to 1956, Congress did not typically appropriate money to pay judgments in lawsuits it had authorized until *after* judgment had been rendered and the claim was submitted to Congress for payment by private bill or otherwise. See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 589 n.254 (2003) ("Before 1956, most judgments were paid through very specific congressional appropriations issued after judgments were entered."). Thus, "[t]he Claims Court operated for decades before 1956 without a permanent appropriation to pay its judgments, under statutes in which the government

plainly had consented to being sued." *Id.* at 598 (footnote omitted).

It has therefore been understood since the 19th century that the question whether the government has waived its sovereign immunity from suit is entirely separate from the question whether the government appropriated money to pay the claims for which it waived its immunity. Indeed, even the government's own manual of appropriations takes this view. See 3 U.S. GAO, GAO/OGC-94-33, *Principles of Federal Appropriations Law* 14-5 (2d ed. 1994) ("*GAO Principles*") ("A waiver of sovereign immunity may result in a judgment against the government but, without more, will not get it paid."); *id.* ("While [the Appropriations Clause] may not prohibit a court from *entering* a judgment, it comes into play with respect to the *payment* of that judgment."); *id.* at 14-13 ("31 U.S.C. § 1304 'is irrelevant to the issue of whether . . . the legal predicate for judgment against the government exists'" (omission in original)) .

The fact that Congress has now created the Judgment Fund does not change this analysis. Congress did not intend for the Judgment Fund to extinguish the historic ability of litigants to seek a private bill from Congress to pay a duly entered judgment. See *Rooney* v. *United States*, 694 F.2d 582, 583 n.2 (9th Cir. 1982) ("[W]e do not read [the Judgment Fund statute] to prohibit plaintiff from seeking judgment interest that is not funded [thereunder] through the traditional route of petitioning Congress for a special appropriation act in the amount of interest due and owing . . . ."). To begin with, when Congress created the Judgment Fund in 1956, it did not apply to any judgment over $100,000, see Pub. L. No. 84-814, ch. XIII, § 1302, 70 Stat. at 694-95; litigants seeking payment for large judgments still had to submit their claims to Congress. Although Congress eliminated this limitation in 1977, see Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, ch. XIV, 91 Stat. 61, 96-97 (codified as amended at 31 U.S.C. § 1304), there are still instances where Congress

authorizes a suit against the government but does not appropriate money to pay any judgments that might arise. See *GAO Principles* at 14-57 (noting that it "is still possible" that "a court might issue a judgment with *no* appropriation legally available from which to pay it").[9] As the government's appropriation manual notes, in these cases, it is still "necessary to seek funds from Congress" through a private bill. *Id.* at 14-58.

By conflating the question whether Congress authorized suit with the question whether Congress appropriated money to pay the resulting judgment, the Federal Circuit abruptly ended what had been a 150-year practice of seeking private bills to pay judgments against the government.

### B. The Federal Circuit's Decision Conflicts With A Plurality Decision Of This Court.

A plurality of this Court has explicitly rejected the Federal Circuit's view that Congress does not waive the government's immunity to hear a suit unless Congress appropriates money to pay any possible judgment. In *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-71 (1962), this Court considered whether the Court of Claims could exercise jurisdiction over a claim for money against the government even though the court's judgment might be unenforceable for lack of an appropriation to pay the judgment. The plurality squarely decided that the lack of an appropriation did not divest courts of jurisdiction to hear a claim for which Congress had otherwise waived sovereign immunity because the "good faith of the United

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[9] For example, for several years after 1977, Congress had authorized attorney's fees against the government in Tax Court cases, but had not made any preexisting appropriation for these awards. *See Source of funds for payment of awards under 26 U.S.C. § 7430*, 63 Comp. Gen. 470, 474 (1984). In addition, the D.C. Circuit has since recognized a claim against the government even though there appeared to be no preexisting appropriation to pay the judgment. *See Ralpho* v. *Bell*, 569 F.2d 636, 639 & n.23 (D.C. Cir. 1977) (per curiam).

States" usually ensured that any judgment would eventually get paid. *Id.* at 571. No other justice expressed disagreement with the plurality's decision.

This Court's decision in *Glidden* makes clear that Congress waives sovereign immunity whenever it authorizes suits against the government, regardless of whether it has already appropriated money to pay any possible judgments. The Federal Circuit's decision in this case is in clear conflict with *Glidden*.

### C. As The Federal Circuit Acknowledged, Its Decision Also Conflicts With Two Other Courts Of Appeals That Have Held That The Lack Of An Appropriation In The Judgment Fund Statute Does Not Affect Whether Sovereign Immunity Has Been Waived.

The Federal Circuit conceded that its holding conflicted with decisions from the D.C. and Ninth Circuits. See App. 20a-24a. On the other hand, the Federal Circuit's opinion is supported by a decision from the Fifth Circuit. Thus, there is now a 2-2 split on this issue.

In *Trout* v. *Garrett*, 891 F.2d 332, 334 (D.C. Cir. 1989), *Rosenfeld* v. *United States*, 859 F.2d 717, 723 (9th Cir. 1988), and *Transco Leasing Corp.* v. *United States*, 992 F.2d 552, 555 (5th Cir. 1993), the courts considered the same question answered by the Federal Circuit in this case—whether Congress's failure to appropriate money in the Judgment Fund statute to pay a claim meant that Congress did not waive sovereign immunity with respect to that claim. In *Trout* and *Rosenfeld*, the courts answered the question the same way it had always been answered, holding that the Judgment Fund statute is entirely irrelevant to whether sovereign immunity has been waived. In *Transco*, the court agreed with the Federal Circuit that the Judgment Fund statute rescinds otherwise valid waivers of sovereign immunity.

In *Trout* and *Rosenfeld*, the question was whether Congress had waived the government's immunity from a claim for interim attorney's fees. In *Trout*, the claim arose in the context of a Title VII suit against the government, and it was conceded that Title VII authorized the interim award. 891 F.2d at 334. In *Rosenfeld*, the claim arose under FOIA, and the court held that FOIA authorized the interim award. 859 F.2d at 723-25. Nonetheless, noting that the Judgment Fund statute appropriated money to pay only final judgments—not interim judgments—the government argued, just as the Federal Circuit held in this case, that the limitation in the Judgment Fund statute should be read as a limitation on waivers of the government's sovereign immunity. *Trout*, 891 F.2d at 334; *Rosenfeld*, 859 F.2d at 725. Both courts flatly rejected this argument.

In *Trout*, then-Judge Ruth Bader Ginsburg held that "[i]t is necessary . . . to distinguish legislation waiving sovereign immunity . . . from prescriptions to facilitate payment of valid claims against the sovereign, notably, 31 U.S.C. § 1304," 891 F.2d at 335. "We find no tenable support for the notion that Congress designed the judgment fund measure to retract or limit duly enacted waivers of sovereign immunity," *id.* The Ninth Circuit came to precisely the same conclusion in *Rosenfeld*, holding that "[t]he Judgment Fund statute is not a superseding limitation on the government's waiver of sovereign immunity." 859 F.2d at 726-27.

The Federal Circuit tried to distinguish *Trout* and *Rosenfeld*, but neither of its attempts to do so have any merit. First, the court noted that, unlike the statutes waiving immunity in *Trout* and *Rosenfeld*, § 1961 incorporates by reference a provision of the Judgment Fund statute, suggesting, in its view, that there has been no unambiguous waiver without also an unambiguous appropriation. App. 22a. The trouble with this reasoning is that the provision of the Judgment Fund statute that the Federal Circuit acknowledged to plausibly appropriate money to pay MOEPSI's

post-judgment interest claim in this case—31 U.S.C. § 1304(a)—is *different* from the provision of the Judgment Fund statute—31 U.S.C. § 1304(b)—incorporated by reference into § 1961, see 28 U.S.C. § 1961(b). Thus, to the extent that the Judgment Fund appropriation affects Congress's waiver of immunity in § 1961, it does so only for the claims referenced in § 1304(b)—*i.e.*, interest on judgments of the Federal Circuit unsuccessfully appealed to this Court by the government, see 31 U.S.C. § 1304(b)(1)(B)—which, again, are not at issue here.

Second, the Federal Circuit reasoned that the attorney's fees awarded in *Trout* and *Rosenfeld* were distinguishable from the interest claim in this case because the "no-interest rule . . . add[s] [a] gloss of strictness on the traditional sovereign immunity analysis." App. 22a-23a (internal quotation marks omitted). This does not distinguish *Trout* and *Rosenfeld*, however, because the "no-interest rule" is merely a particular application of the general rule that waivers of sovereign immunity must be specific and unambiguous; the same rule applied to the attorney's fees that were at issue in *Trout* and *Rosenfeld*. See, *e.g.*, *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) ("The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." (citing *Shaw*, 478 U.S. at 318 (setting forth no-interest rule))).

On the other hand, the Fifth Circuit supports the Federal Circuit's view. In *Transco*, the question was whether Congress had waived the government's immunity from interest on a district court judgment. 992 F.2d at 554. The court held that Congress did waive the government's immunity, but that the Judgment Fund statute limited the waiver to the time period over which Congress had appropriated money to pay such judgments. See *id.* at 555 ("Section 1304(b) . . . acts as more than an appropriation

statute, it limits the *liability* of the United States for postjudgment interest, by limiting the waiver of sovereign immunity to the time periods it specifies."). The court noted that, historically, successful litigants could "petition Congress for a special appropriation for the accrued, but unfunded, interest award," but held that this changed when Congress lifted the $100,000 cap on judgments that could be paid from the Judgment Fund. *Id.*

In both *Trout* and *Rosenfeld*, the courts of appeals left open the historic ability of litigants to ask Congress to pay judgments for which it had not yet appropriated money. See *Trout*, 891 F.2d at 335 ("[W]e do not doubt the government's ability to arrange for payment of its lawfully-declared debts."); *Rosenfeld*, 859 F.2d at 727. This avenue is now closed in the Fifth and Federal Circuits. This Court should grant this petition and resolve the conflict.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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January 5, 2005

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# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

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No. 03-5147

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MARATHON OIL COMPANY and MOBILE OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
*Plaintiffs-Appellants*,

v.

UNITED STATES,
*Defendant-Appellee.*

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DECIDED: June 30, 2004.
Rehearing and Rehearing En Banc Denied Oct. 7, 2004.

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Before CLEVENGER, GAJARSA, and PROST, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* CLEVENGER. Dissenting opinion filed by *Circuit Judge* PROST.

CLEVENGER, *Circuit Judge*.

Marathon Oil Company and Mobil Oil Exploration and Producing Southeast, Inc. (collectively "the Oil Companies") brought a breach of contract claim against the United States in the Court of Federal Claims. After appeal to the Federal Circuit and to the Supreme Court, they prevailed, and the Federal Circuit entered judgment in their favor on remand. *Marathon Oil Co. v. United States*, 236 F.3d 1313, 1315-16 (Fed.Cir.2000) ("*Contract Judgment*").

The Oil Companies demanded post-judgment interest on the Federal Circuit contract judgment. When the government refused to pay, the Oil Companies brought a new claim alleging that they were entitled to the interest under 28 U.S.C. § 1961(c)(2). The Court of Federal Claims dismissed their complaint. *Marathon Oil Co. v. United States*, 56 Fed.Cl. 768 (2003) ("*Interest Opinion*"). We affirm the judgment of the Court of Federal Claims dismissing the Oil Companies' claim for post-judgment interest. We hold that the Oil Companies have not demonstrated a waiver of sovereign immunity for post-judgment interest on final judgments against the United States in the Federal Circuit that unambiguously extends to encompass their contract judgment.

## I

In 1981, the Oil Companies purchased interests in oil and gas leases from the United States. In 1990, new federal legislation impacted the Oil Companies' rights under the lease contracts. The Oil Companies sued for breach of contract in the Court of Federal Claims and won, receiving judgments in the amount of over $78 million each. *Conoco, Inc. v. United States*, 35 Fed. Cl. 309 (1996). On appeal, we reversed, *Marathon Oil Co. v. United States*, 177 F.3d 1331 (Fed. Cir.1999), but the Supreme Court granted certiorari and reversed again, *Marathon Oil Co. v. United States*, 528 U.S. 1002, 120 S.Ct. 494, 145 L.Ed.2d 381 (1999), holding that the government had breached its contracts with the Oil Companies. On December 28, 2000, we rejected an argument by the government on remand that the damages award should be reduced, and we affirmed the initial judgments of the Court of Federal Claims. *Contract Judgment*, 236 F.3d at 1315-16. The mandate issued on February 23, 2001, and the government did not seek review in the Supreme Court. On February 28, 2001, the Court of Federal Claims reinstated its initial judgments in favor of the Oil Companies, and on May

1, 2001, the government paid the amounts specified in the judgments to the Oil Companies.

The amounts paid, however, did not include post-judgment interest on the Federal Circuit contract judgment. The Oil Companies made a demand to the Department of the Treasury for this interest, but the demand was rejected. The Oil Companies next filed this lawsuit seeking post-judgment interest for the period from December 28, 2000—the date of the Federal Circuit's contract judgment on remand from the Supreme Court—through May 1, 2001—the date on which the government paid the contract judgment. In the Court of Federal Claims, the Oil Companies argued that 28 U.S.C. § 1961(c)(2) waives the government's sovereign immunity from a claim for post-judgment interest on the contract judgment because the statute requires the government to pay post-judgment interest on "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit." 28 U.S.C. § 1961 (c)(2) (2000).

The Court of Federal Claims rejected the Oil Companies' arguments and dismissed their complaint. *Interest Opinion*, 56 Fed.Cl. at 776. The court stated two reasons why section 1961(c)(2) did not waive sovereign immunity for post-judgment interest on the Oil Companies' contract judgment. First, the court held that "the plaintiffs received their awards . . . pursuant to final judgments of the Court of Federal Claims, not the U.S. Court of Appeals for the Federal Circuit." *Id.* at 773. Therefore, the "'judgment' of the Federal Circuit on December 28, 2000 was not a 'final judgment' within the contemplation of 28 U.S.C. § 1961(c)(2). . . . " *Id.* Second, the court held that, even assuming the Federal Circuit judgment to be a "final judgment" for the purposes of section 1961(c)(2), the waiver of sovereign immunity for post-judgment interest on some Federal Circuit judgments that is embodied in section 1961(c)(2) did not unambiguously

encompass interest on the Oil Companies' contract judgment. *Id.* at 773-75.

The Oil Companies timely appealed the Court of Federal Claims judgment to us, and we have jurisdiction to hear the appeal under 28 U.S.C. § 1295(a)(3).

II

This appeal turns on the proper interpretation of a "final judgment" as the term is used in 28 U.S.C. § 1961(c)(2), and on the scope of the waiver of sovereign immunity effected by that statute. This court reviews without deference both issues of statutory construction, *Ainslie v. United States*, 355 F.3d 1371, 1373 (Fed.Cir.2004), and issues of sovereign immunity, *Ins. Co. of the West v. United States*, 243 F.3d 1367, 1370 (Fed.Cir.2001).

"As sovereign, the United States, in the absence of its consent, is immune from suit." *Library of Congress v. Shaw*, 478 U.S. 310, 315, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) (citing *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)). Guided by "the historical view that interest is an element of damages separate from damages on the substantive claim," *id.* at 314, 106 S.Ct. 2957, the rule of sovereign immunity not only extends to create governmental immunity from an interest award, it does so in the guise of the "no-interest rule," requiring consent to liability for interest on a damage award to be "affirmatively and separately contemplated by Congress," *id.* at 315, 106 S.Ct. 2957. Thus, the waiver for sovereign immunity for interest must be distinct from a general waiver of immunity for the cause of action resulting in the damages award against the United States. *See id.* at 316, 106 S.Ct. 2957 (affirming that "federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result"); *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed.Cir.1993) ("Interest may not be recovered against the

government in the absence of an explicit waiver of sovereign immunity for that purpose."). The no-interest rule applies to claims for post-judgment interest. *See, e.g., United States v. N.Y. Rayon Imp. Co.*, 329 U.S. 654, 661, 67 S.Ct. 601, 91 L.Ed. 577 (1947) (noting that the no-interest rule includes claims for interest "arising out of pre-existing judgments").

Well established rules of statutory construction frame a court's analysis of whether Congress has waived sovereign immunity in a statute or statutory scheme, and they tilt the interpretive playing field in favor of the government's immunity. "In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, and not enlarge the waiver 'beyond what the language requires.'" *Shaw*, 478 U.S. at 318, 106 S.Ct. 2957 (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) (quoting *E. Transp. Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 71 L.Ed. 472 (1927)) (citation omitted)). A waiver of sovereign immunity "must be unequivocally expressed," or a court must infer that Congress did not intend to create a waiver. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)); *see also United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); *Kalan, Inc. v. United States*, 944 F.2d 847, 849-50 (Fed.Cir.1991). If a statute is susceptible to a plausible reading under which sovereign immunity is not waived, the statute fails to establish an unambiguous waiver and sovereign immunity therefore remains intact. *See Nordic Vill.*, 503 U.S. at 37, 112 S.Ct. 1011.

With respect to waiver of sovereign immunity for interest on damage awards against the United States, "[t]he no-interest rule provides an added gloss of strictness upon these usual rules." *Shaw*, 478 U.S. at 318, 106 S.Ct. 2957. To conclude that a statute waives sovereign immunity for interest:

> [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

*Id.* (quoting *N.Y. Rayon Imp.*, 329 U.S. at 659, 67 S.Ct. 601) (alteration in original).

III

The Oil Companies contend on appeal that 28 U.S.C. § 1961(c)(2) demonstrates that Congress has waived sovereign immunity for post-judgment interest on their contract judgment. The Court of Federal Claims provided two grounds to support its conclusion that the Oil Companies' contention is incorrect. We examine each in turn.

A

The Court of Federal Claims erred in holding that the December 28, 2000 judgment was not a "final judgment[ ] . . . in the United States Court of Appeals for the Federal Circuit" as envisioned by 28 U.S.C. § 1961(c)(2). Although it is true, as the Court of Federal Claims noted, that "the language of the Federal Circuit's opinion and judgment . . . clearly state[s] that the court was affirming the prior judgments of the Court of Federal Claims," *Interest Opinion*, 56 Fed.Cl. at 771, the legal accuracy of a trial court's judgment is not determinative of the status of the judgment of a court of appeals as

a final judgment of that court. A final judgment is "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment." *Black's Law Dictionary* 847 (7th ed.1999); *cf. Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945) (holding that in the context of appellate jurisdiction a 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment). Our December 28, 2000 judgment was, temporally, our last action in the Oil Companies' suit for breach of contract, and it did not remand any substantive disputes on liability or on damages for resolution in the Court of Federal Claims. *Cf. Williams v. Principi*, 275 F.3d 1361, 1364 (Fed.Cir.2002) (noting that a remand is generally not a final judgment). It was, therefore, a final judgment of this court for the purposes of section 1961(c)(2).

B

Given that the December 28, 2000 judgment was a final judgment of the Federal Circuit under section 1961(c)(2), we must consider whether section 1961(c)(2) unambiguously waives sovereign immunity for post-judgment interest on "all" judgments of the Federal Circuit as the Oil Companies posit it does.

1

Section 1961(c)(2) cannot be read in isolation. Its express language triggers a chain of cross-references that links four distinct statutory provisions.

Section 1961, in its entirety, provides as follows:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is

held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[ ] the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1986.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

28 U.S.C. § 1961 (2000 & Supp. III 2003).

As relevant to this appeal, section 1961(c)(2) provides that "interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit . . . as provided in subsection (b),"[1] *id.* § 1961(c)(2), and section 1961(b) states that "[i]nterest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually," *id.* 1961(b). Section 2516(b), in turn, provides that: "[i]nterest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at" the same rate specified in 28 U.S.C. § 1961(a). *Id.* § 2516(b).

Finally, chapter 13 of title 31, entitled "Appropriations," contains 31 U.S.C. § 1304, commonly known as the Judgment Fund statute, which, according to its title, creates an appropriation for "Judgments, awards, and compromise settlements." Section 1304(b), the only subsection of section 1304 referenced in 28 U.S.C. § 1961(b), provides as follows:

> (1) Interest may be paid from the appropriation made by this section—
>
> > (A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance; or
> >
> > (B) *on a judgment of the Court of Appeals for the Federal Circuit* or the United States Court of Federal Claims *under section 2516(b) of title 28, only from the*

[1] The reference to subsection (c)(1) in section 1961(c)(2) applies only to tax cases and is not germane to the Oil Companies' argument. The reference to subsection (a) only determines the rate at which interest is calculated, and that rate is not in contention in this appeal.

> *date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance.*
>
> (2) Interest payable under this subsection in a proceeding reviewed by the Supreme Court is not allowed after the end of the term in which the judgment is affirmed.

31 U.S.C. § 1304(b) (2000) (emphases added).

2

The Oil Companies' argument is straightforward. The Oil Companies argue that, under the plain language of section 1961(c)(2), Congress has unambiguously waived sovereign immunity for "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit." All means all, they say, and all includes their contract judgment.

The Oil Companies recognize that section 1961(c)(2) provides for interest on judgments only "as provided in subsection (b)," but they contend that subsection (b) supports, rather than detracts from, their argument. Subsection (b) formulates a general rule for calculating interest and identifying the time period during which interest accrues: [I]nterest shall be computed daily to the date of payment. . . . 28 U.S.C.1961(b). This general rule applies except as provided in section 2516(b) of this title and section 1304(b) of title 31. Id. According to the Oil Companies, these two sections merely place different constraints on the computation of interest. They permit interest only on a particular subset of judgments against the United States—those judgments "against the United States affirmed by the Supreme Court after review on petition of the United States." 28 U.S.C. 2516(b); see also 31 U.S.C. 1304(b)(1)(B) (addressing only interest "on a judgment of the Court of Appeals for the Federal Circuit . . . under section 2516(b) of title 28"). With respect to these particular judgments against the United

States, the two statutes define a window during which interest is available that is different from the one specified in section 1961(b), stating that interest is to be computed "only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance." 31 U.S.C. 1304(b)(1)(B).

According to the Oil Companies' theory, neither section 1961(b) nor the two statutes it references negate the government's liability for interest on all Federal Circuit judgments established in section 1961(c)(2) because these statutes address only the secondary, technical issue of how to compute the required interest. Furthermore, the Oil Companies contend that the interest owed on their contract judgment is unaffected by 28 U.S.C. § 2516(b) or 31 U.S.C. § 1304(b). These sections are only relevant to the limited set of judgments expressly delineated therein—that is, to judgments "affirmed by the Supreme Court after review on petition of the United States." For all judgments against the United States that the United States does not unsuccessfully appeal to the Supreme Court, the Oil Companies insist that the provisions in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304 (b)(1)(B) do not impact the existence or the scope of the government's waiver of sovereign immunity as established in section 1961.

In summary, the Oil Companies contend (1) that section 1961(c)(2) provides a rule that is applicable to all (meaning *all* ) judgments of the Federal Circuit, and (2) that 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b) merely list particular circumstances not relevant to this appeal under which interest on judgments of the Federal Circuit against the United States is computed according to a rule other than the one specified in section 1961(b). Because the United States did not petition the Supreme Court for review of the Oil Companies' contract judgment, the Oil Companies argue that the exceptions do not affect their right to post-judgment interest, and they seek

interest running from the date the judgment was entered to the date the judgment was paid as provided in section 1961(b).

Viewing this argument from a historical perspective, the Oil Companies propose that the Federal Courts Improvement Act of 1982 ("FCIA"), Pub.L. No. 97-164, 96 Stat. 25 (1982), which created this court and enacted subsections (b) and (c)(2) of 28 U.S.C. § 1961, left the pre-1982 waiver of sovereign immunity for post-judgment interest intact for all of the judgments that it had historically encompassed, but created a new—and broader—waiver for interest on all other judgments for which sovereign immunity had never before been waived.

Prior to the enactment of FCIA, 31 U.S.C. § 724a contained language similar to the post-FCIA language now found in 31 U.S.C. § 1304(b). Section 724a, entitled "Appropriations for payment of judgments . . . against the United States," stated that "whenever a judgment rendered by the Court of Claims [now the Court of Appeals for the Federal Circuit] is payable from this appropriation, interest payable thereon in accordance with section 2516(b) of title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office." 31 U.S.C. § 724a (1976). Prior to 1982, 28 U.S.C. § 2516(b) provided, as it does today, for interest on judgments "against the United States affirmed by the Supreme Court after review on petition of the United States." 28 U.S.C. § 2516(b) (1976). Before the FCIA, these two statutes were the only statutes addressing post-judgment interest on judgments of the Court of Claims, and they were held to waive sovereign immunity "for post-judgment interest only during the period that [the government] appealed its adverse judgment to the Supreme Court." *Thompson v. Kennickell*, 797 F.2d 1015, 1018 (D.C.Cir.1986). We find no cases suggesting that prior to 1982 the government paid post-judgment interest on Court of Claims judgments against the

United States that the United States did not seek to have reviewed in the Supreme Court.

Thus, for judgments of the Federal Circuit against the United States reviewed by the Supreme Court on the government's request and affirmed, the Oil Companies suggest that the pre- and post-FCIA waiver of sovereign immunity is identical and that the waiver is "for post-judgment interest only during the period that [the government] appealed its adverse judgment to the Supreme Court." *Id.* The Oil Companies contend, however, that while this figure has remained constant, the FCIA shifted the ground from black to white. The Oil Companies argue that subsections (c)(2) and (b) of section 1961 now not only waive sovereign immunity for post-judgment interest on all judgments against the United States that the government chooses not to appeal to the Supreme Court—judgments that were previously entirely beyond the scope of the waiver of sovereign immunity for post-judgment interest—but also that they waive sovereign immunity for interest on such judgments from the date of the judgment until the date of payment—a time period potentially longer than is permitted for appealed judgments.

Needless to say, the government views the effect of the statutory scheme on sovereign immunity from liability for post-judgment interest differently. It argues that the pre-FCIA regime remains in force today unaltered by the enactment of subsections (c)(2) and (b) of section 1961. It argues that the relevant statutes are clear on their face, waiving immunity only narrowly as in the past, and that, at best, the Oil Companies have demonstrated an ambiguity in the statutory scheme that by law precludes a waiver of sovereign immunity.[2]

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[2] The government also argues that we are bound by our previous decision in *Zumerling v. Marsh*, 783 F.2d 1032, 1036 n. 12 (Fed.Cir.1986), to hold that sovereign immunity has been waived only for final judgments of

We conclude that the Oil Companies have not demonstrated an unequivocal or unambiguous waiver of sovereign immunity for post-judgment interest on their contract judgment. The interaction of sections 1961(c)(2) and (b), on the one hand, and sections 2516(b) and 1304(b), on the other hand, is subject to plausible readings under which Congress has not waived sovereign immunity for post-judgment interest on judgments of the Federal Circuit against the United States that the United States does not seek to have reviewed in the Supreme Court.

In the end, the legal choice is simple and self-evident. Either the relevant statute could mean that all final judgments of the Federal Circuit carry post-judgment interest, or it could mean that all final judgments as provided in the relevant statutes, less than the global universe of "all final judgments," carry such interest. Given the legal test to be administered to the statutes at hand, and the statutes themselves as discussed below, there can be no doubt that Congress has not unequivocally excluded the narrower reading of the relevant statutes. Given the fact that Congress never before had even contemplated waiving sovereign immunity for post-judgment interest on *all* final judgments of a court of appeals, the notion that it has done so for the Federal Circuit with nary a word of legislative history to support such a sweeping change strikes us as nearly beyond comprehension.

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the Federal Circuit affirmed by the Supreme Court. We disagree. In *Zumerling*, we stated that "[s]ection 2516(b) is only applicable . . . to 'judgment[s] against the United States affirmed by the Supreme Court after review on petition of the United States.'" *Id.* As previously noted, this statement is uncontroversial, and it is not contested by the parties in this appeal. In *Zumerling*, we did not address whether sovereign immunity has been waived for judgments that do not fall within the ambit of section 2516(b).

Section 1961(b) establishes a general rule for interest calculation "except as provided in section 2516(b) of this title and section 1304(b) of title 31." 28 U.S.C. § 1961(b). On its face, it is susceptible to both a reading favoring the Oil Companies and a reading favoring the government.

As discussed above, the Oil Companies suggest one reading: The exception in section 1961(b) should be read to mean "except as provided [for the specific set of judgments listed] in section 2516(b) . . . and section 1304(b)," namely except when the judgment against the United States is "affirmed by the Supreme Court after review on petition of the United States," 28 U.S.C. § 2516(b).

However, a second plausible reading exists as well. The reference to sections 2516(b) of title 28 and 1304(b) of title 31 is a citation to all of the relevant provisions in the United States code that deal directly with post-judgment interest on judgments against the government,[3] so the reference to these statutes in section 1961(b) can be read to refer to all judgments against the government. According to this reading, the exception in section 1961(b) should be read to mean "except as provided [for the general class of judgments addressed] in section 2516(b) . . . and section 1304(b)," namely except when the judgment is against the government.

Under this second reading, there is no waiver of sovereign immunity for post-judgment interest on a judgment like the Oil Companies' contract judgment that the government does not seek, unsuccessfully, to have reviewed in the Supreme Court. Interest on such a judgment is withdrawn from the scope of the general rule in section 1961(b) because the judgment is against the government, but does not fall within

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[3] Other interest provisions exist for judgments not controlled by section 1961(b). *See, e.g.*, 28 U.S.C. § 1961(c)(1).

the scope of the interest provisions of 28 U.S.C. § 2516(b) and/or 31 U.S.C. § 1304(b) because the judgment does not satisfy the criteria therein stated. In sum, under this reading, Congress has not created a rule for computing interest on such a judgment, so Congress has not waived immunity for interest on such a judgment.

The Oil Companies argue that the second reading is not a plausible reading because it renders section 1961(c)(2) superfluous by making sections 2516(b) and 1304(b) determinative of the outcome in all cases seeking post-judgment interest on judgments of the Federal Circuit. In the context of section 1961 as a whole, we conclude that some redundancy in statutory provisions is insufficient to transform a plausible reading into an implausible one. Several provisions of section 1961(c) are replete with redundancy, and section 1961(c) is thus more easily read as providing an overview intended to emphasize and to cross-reference rather than as codifying law not provided for elsewhere. For example, subsection (c)(3) states that: "Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law." 28 U.S.C. § 1961(c)(3). Court of Federal Claims judgments are mentioned nowhere else in section 1961; subsection (1), which provides the rule for internal revenue tax cases, would presumably apply to internal revenue tax cases in the Court of Federal Claims without the aid of subsection (c)(3); "other provision[s] of law" would also presumably apply to Court of Federal Claim judgments without the benefit of subsection (c)(3). Likewise, subsection (4) states that: "This section shall not be construed to affect the interest on any judgment of any court not specified in this section." *Id.* § 1961(c)(4). Presumably, this provision is redundant in light of ordinary plain-meaning principles of statutory interpretation, and strict-construction principles of sovereign immunity, and was added by Congress for emphasis.

In summary, the reading of the "except as provided in" language of section 1961(b) under which Congress did not waive sovereign immunity for post-judgment interest on the Oil Companies' contract judgment is a plausible reading, and the existence of a plausible reading under which Congress has not waived sovereign immunity means that we are obliged to conclude from the plain language of the statute that Congress did not intend to waive sovereign immunity. *See Nordic Vill.*, 503 U.S. at 37, 112 S.Ct. 1011 (noting that sovereign immunity was not waived because the readings of a statute that did not waive sovereign immunity were, although "assuredly not the only readings," plausible readings).

4

Another argument suggests to us as well that, despite the presence of the word "all" in section 1961(c)(2), Congress has not unequivocally waived sovereign immunity for interest on judgments of the Federal Circuit against the United States unless the criteria listed in 31 U.S.C. § 1304(b) are satisfied. There can be no unequivocal waiver of sovereign immunity for post-judgment interest on a broad array of judgments of this court if Congress has not clearly appropriated funds with which the government can pay the interest.

i

Under the Appropriations Clause of the Constitution, funds from the Treasury cannot be used for purposes other than those permitted by the appropriating statute. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) ("Money may be paid out [of the Federal Treasury] only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute."); *id.* at 432, 110 S.Ct. 2465 ("The general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a

judgment based on a substantive right to compensation based on the express terms of a specific statute."). The congressional appropriation that creates the Judgment Fund, from which the government pays interest on all judgments "not otherwise provided for," 31 U.S.C. § 1304(a)(1), thus can only be dispensed in accordance with the terms of section 1304. In light of these strict rules governing the expenditure of the Treasury's funds, it is plausible to construe the role of section 1304(b) in the concatenation of statutes at issue in this appeal as more important than merely explaining the method of computing post-judgment interest for the narrow subset of judgments against the United States that the Oil Companies argue are excepted from section 1961(b). It is plausible to conclude that the scope of the appropriation in section 1304(b) is jurisdictional in nature, and that the government has waived sovereign immunity—and thus is liable—only for the interest specified therein. Under this reading, Congress intended to waive sovereign immunity only for interest payments that satisfy the conditions of section 1304(b) because Congress has appropriated funds to pay interest only under those conditions. Inversely, Congress did not intend to waive sovereign immunity for interest payments for which Congress has provided no funds.

As discussed above, the Oil Companies' claim for interest on their contract judgment does not satisfy the conditions of section 1304(b), so to the extent that the statutory restrictions on dispersal of funds from the Judgment Fund to pay interest on judgments are jurisdictional, the Oil Companies' claim must fail. The Oil Companies failed to counter the proposition that section 1304 is the only potential existing source of funding for the post-judgment interest that they seek and that Congress has not provided for payment of the interest allegedly authorized by section 1961(c)(2) elsewhere.[4] Section

[4] At oral argument, the Oil Companies did propose that subsection (a) of section 1304 provides an appropriation unlimited by the restrictions of

1304(b)(1)(B) permits payment of interest from the Judgment Fund appropriation created by section 1304 only on final judgments of the Federal Circuit against the United States that the United States unsuccessfully appeals to the Supreme Court. *See* 31 U.S.C. § 1304(b)(1)(B) (concerning only judgments "of the Court of Appeals for the Federal Circuit . . . under section 2516(b) of title 28"); 28 U.S.C. § 2516(b) (pertaining only to judgments "against the United States affirmed by the Supreme Court after review on petition of the United States"). The government did not petition for review of the Oil Companies' contract judgment, so Congress has not expressly appropriated funds in section 1304(b)(1)(B) to pay interest on judgments such as the Oil Companies' contract judgment. No other subsection of 1304(b) permits payment of the sought-after interest either. *See* 31 U.S.C. § 1304 (b)(1)(A) (addressing interest "on a judgment of a district court"); *id.* § 1304(b)(2) (placing an additional limitation on interest otherwise payable under subsection (b)(1)).

Returning to the language of section 1961(c)(2), whether the word "all" claims a universe that includes a subset of final judgments for which certiorari is successfully taken, or whether Congress meant "all" to mean all of those cases for which it clearly has provided a source of funding in section 1304 but not another category of final judgments for which Congress has provided no funding, is ambiguous. However, construing the interest-related provisions of the Judgment Fund in section 1304(b) as limitations on the government's waiver of sovereign immunity, we would be required to find ambiguity in the overall statutory scheme even if the language of subsections (c)(2) and (b) of section 1961 were, hypothetically, crystal clear when read in isolation from the Judgment Fund statute.

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subsection (b) that could be used to satisfy their claim for post-judgment interest. This argument is addressed, and dismissed, in Section III.B.4.iii, *infra*.

The reasonableness of concluding that the contours of section 1304(b)(1) determine the liability of the United States for post-judgment interest is supported by the pronouncements of other courts on the jurisdictional nature of section 1304(b)(1). In *Transco Leasing Corp. v. United States*, 992 F.2d 552, 554-55 (5th Cir.1993), the Fifth Circuit interpreted section 1304(b)(1)(A), the statute controlling access to the Judgment Fund for the government to pay interest on judgments of the district courts, as determinative of the scope of Congress's waiver of sovereign immunity:

> Section 1961[ (b) ] restricts the liability of the United States for postjudgment interest to amounts funded in section 1304. Section 1304(b), then, acts as more than an appropriation statute, it limits the *liability* of the United States for postjudgment interest, by limiting the waiver of sovereign immunity to the time periods it specifies. Accordingly, we reject appellees' contention that section 1304 is not controlling because it is an appropriation statute which determines which judgments and amounts the United States will pay, but does not determine whether or not the United States is liable for a particular judgment or award of interest.

*Transco Leasing*, 992 F.2d at 555 (citations omitted); *see also Bhargava v. Veneman*, 143 F.Supp.2d 16, 18 (D.D.C.2001) (construing 31 U.S.C. § 1304(b)(1)(A) as a waiver of sovereign immunity that determines the conditions under which interest on district court judgments may be awarded against the United States); *Moyer v. United States*, 612 F.Supp. 239, 241 (D.Nev.1985) (same).

We are aware of two cases from sister circuits that have held that a different aspect of the Judgment Fund statute—the incorporation of 28 U.S.C. § 2414 in section 1304 (a)(3)(A)—is not "a superseding limitation on the govern-

ment's waiver of sovereign immunity." *Rosenfeld v. United States*, 859 F.2d 717, 725-27 (9th Cir.1988); *see also Trout v. Garrett*, 891 F.2d 332, 334-35 (D.C.Cir.1989). In relevant part, section 1304(a) provides that:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
>
> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Secretary of the Treasury; and
>
> (3) the judgment, award, or settlement is payable—
>
> (A) under section 2414 . . . of title 28. . . .

31 U.S.C. § 1304(a). Section 2414 provides for "payment of final judgments rendered by a district court . . . against the United States." 28 U.S.C. § 2414 (2000).

In *Trout*, the district court granted the Title VII plaintiffs' claim for interim attorney fees; the government conceded that Congress had waived sovereign immunity for such a claim, *see* 891 F.2d at 334 (relying on the Title VII provision codified in 42 U.S.C. § 2000e-5(k) that provides "the United States shall be liable for costs the same as a private person"); and the court characterized the government's concession as an acknowledgement of a "well-accepted" legal proposition, *id.* The government insisted, however, that sovereign immunity for immediate payment of this interim attorney fees award had not been waived because limitations on the dispersal of funds from the Judgment Fund prevented the government from paying the award until the end of the litigation produced a final, not an interim, judgment. The government's argument relied on the language in section 1304(a)(3)(A) permitting payment from the judgment fund for judgments "under section 2414," and section 2414's pro-

vision solely for the "payment of final judgments." The court ruled against the government, however, concluding that the language in section 2414 incorporated by reference into the Judgment Fund statute was not designed "to retract or limit duly enacted waivers of sovereign immunity." *Id.* at 335; *see also Rosenfeld*, 859 F.2d at 726 ("Since Congress waived sovereign immunity from attorney's fees in the FOIA actions . . . no additional waiver is required [in the Judgment Fund statute] for interim fees.").

We express no opinion on whether the waiver of sovereign immunity from interim attorney fees in these cases was truly "unequivocally expressed," *Mitchell*, 445 U.S. at 538, 100 S.Ct. 1349, but we conclude that the discussion of 28 U.S.C. § 2414 in *Rosenfeld* and *Trout* does not render implausible our interpretation of the role that 31 U.S.C. § 1304(b)(1) plays in maintaining and waiving sovereign immunity for interest on Federal Circuit judgments against the United States. The courts in both *Trout* and *Rosenfeld* relied on the fact that self-contained waivers of sovereign immunity existed in Title VII and the FOIA, statutes completely unconnected to the Judgment Fund statute. In contrast, the alleged waiver of sovereign immunity in section 1961(c)(2) on which the Oil Companies rely in the instant case includes a reference, via section 1961(b), to the very limitations in section 1304(b)(1)(B) at issue. Whereas the court in *Trout* began its analysis of the Judgment Fund statute by reaffirming the "well-accepted" proposition that "sovereign immunity does not bar a *claim* by a Title VII plaintiff for interim fees against the government," 891 F.2d at 334, we must consider the reference to the Judgment Fund statute in section 1961(b) in the first instance to determine whether a claim for interest by a party granted a final judgment by the Federal Circuit is barred by sovereign immunity.

Additionally, the sovereign immunity inquiry is different for the Judgment Fund provision in section 1304(a), ad-

dressed in *Trout* and *Rosenfeld*, and the Judgment Fund provision in section 1304(b) at issue here. The interest-specific provisions in subsection (b) are subject to the "no-interest rule" and thus to an "added gloss of strictness" on the traditional sovereign immunity analysis. *Shaw*, 478 U.S. at 318, 106 S.Ct. 2957.

Finally, we note that *Rosenfeld* relied on the fact that "when a court has rejected the Judgment Fund argument [casting section 1304 as a waiver of sovereign immunity], the government has managed to pay the interim fee award." 859 F.2d at 727. For evidence of this fact, *Rosenfeld* cited *Jurgens v. EEOC*, 660 F.Supp. 1097 (N.D.Tex.1987), which states:

> In both this case and *Shafer[ v. Commander, Army & Air Force Exchange Service*, No. CA 3-76-1246-R, 1985 WL 9492 (N.D.Tex. Dec. 3, 1985)], the defendants argued that they could not pay the interim awards due to the restrictions of [31 U.S.C. § 1304] and [28 U.S.C. § 2414]. When faced with a citation for contempt of court, however, the defendants in *Shafer* made immediate payment. The court believes that the EEOC can also arrange for immediate payment of this court's interim award.

*Jurgens*, 660 F.Supp. at 1102. However, the Supreme Court has stated that:

> [I]t would be most anomalous for a judicial order to require a Government official . . . to make an extra-statutory payment of federal funds. It is a federal crime, punishable by fine and imprisonment, for any Government officer or employee to knowingly spend money in excess of that appropriated by Congress.

*Richmond*, 496 U.S. at 430, 110 S.Ct. 2465. Here, where the Oil Companies cannot suggest an appropriate statutory appropriation of funds with which interest on their $156 million contract judgments could be paid, we decline to infer

that Congress intended to waive sovereign immunity for post-judgment interest when payment could only occur extra-statutorily.

As with the core ambiguity in section 1961(c)(2), we thus conclude that it is plausible to read section 1304(b)(1)(B) to likewise "determine whether or not the United States is liable for a particular judgment or award of [post-judgment] interest." *Transco Leasing*, 992 F.2d at 555.

iii

Requested at oral argument to identify a statute authorizing the appropriation of funds from which interest on their contract judgment could be paid, as interest cannot be paid under the terms of section 1304(b)(1), the Oil Companies were quick to suggest section 1304(a). The Oil Companies argue that the interest on "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit" described in section 1961(c)(2) is interest . . . otherwise authorized by law as provided for in section 1304(a), and that section 1304(a) by its own force therefore appropriates the "[n]ecessary amounts" to pay their sought-after interest. Even assuming that the interest mentioned in section 1961(c)(2) is "interest . . . otherwise authorized by law," however, this argument fails.

Section 1304(a) authorizes payment from the Judgment Fund only when the judgment is payable under one of the statutes listed in subsection (a)(3), as the numbered subsections of the statute are written in the conjunctive. In full, section 1304(a)(3) authorizes the appropriation of funds "when . . . the judgment, award, or settlement is payable—"

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

> (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473).

31 U.S.C. § 1304(a)(3). None of the listed statutes authorize the payment of a judgment of the Federal Circuit. Thus, to the extent that the Oil Companies seek payment of interest based on their contract judgment obtained in this court, section 1304(a) does not aid their cause.

The Oil Companies could argue, however, that the judgment for which they seek payment from the Judgment Fund is the Court of Federal Claims judgment that they would receive if they were to prevail on this appeal. Subsection (a)(3)(A) provides for payment from the Judgment Fund of judgments payable under 28 U.S.C. § 2517, which in turn authorizes the payment of "every final judgment rendered by the United States Court of Federal Claims against the United States," 28 U.S.C. § 2517(a) (2000). A construction of section 1304(a) permitting payment from the Judgment Fund under this theory is tenuous, as it would require two different portions of section 1304(a) to refer to two different judg-ments: the interest . . . otherwise authorized by law in subsection (a) would refer to interest on the Oil Companies' Federal Circuit contract judgment, and the judgment payable under section 2517 in subsection (a)(3)(A) would refer to the Court of Federal Claims judgment sought in this appeal. Nonetheless, even accepting this construction of section 1304(a), the Oil Companies' argument fails to demonstrate an unambiguous waiver of sovereign immunity. Subsection (a) of section 1304 is clearly not independent of subsection (b)(1), and subsection (b)(1) is plausibly read to limit the post-judgment interest payable under subsection (a).

This line of analysis requires us to confront the language in section 1304(b)(1) which states that "[i]nterest may be paid

from the appropriation made by this section," namely section 1304 or the Judgment Fund as a whole. 31 U.S.C. 1304(b)(1) (emphasis added). If the "may" language in subsection (b)(1) is simply permissive, allowing not only the conditions in (a) and (b) but other conditions as well to warrant payment from the Judgment Fund, the Oil Companies could navigate the interstices of section 1304 with success. But the matter is not so simple, as the word "may" in some contexts is not permissive but indeed is interpreted as restrictive in nature.[5] See, e.g., *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 197-204, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000) (resolving the ambiguity between permissive and restrictive interpretations of the word "may" in the venue provisions of the Federal Arbitration Act (FAA)); *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 38, 98 S.Ct. 88, 54 L.Ed.2d 218 (1977) (noting that it is "settled" that the word "may" in 12 U.S.C. § 94 means "may . . . only" in the restrictive sense of the word). Whereas a permissive reading of may would make subsection (b)(1) an enumeration of conditions sufficient for the payment of post-judgment interest, a restrictive reading of may would transform subsection (b)(1) into a list of conditions necessary for the payment of post-judgment interest. Without doubt, if the may in subsection (b)(1) were to be

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[5] A distinct dimension of ambiguity sometimes lodged in the word "may" is the distinction between discretion and duty, or the possibility that "may" means "must." *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction is by no means invariable, however, . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." (citations and footnote omitted)); *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359, 15 S.Ct. 378, 39 L.Ed. 450 (1895) ("It is familiar doctrine that, where a statute confers a power to be exercised for the benefit of the public or of a private person, the word 'may' is often treated as imposing a duty, rather than conferring a discretion.").

restrictive, then the provisions of subsection (b)(1)(B) would clearly prohibit the payment of interest on the Oil Companies' final contract judgment of this court in this particular case. Thus, for the Oil Companies to succeed, the permissive reading must be unequivocally the proper reading. We decline to reach this conclusion.

In *Cortez Byrd Chips*, the Supreme Court interpreted the meaning of the word "may" in three related venue provisions of the FAA, including section 9 that provides that, to confirm an arbitration award, "application may be made to the United States court in and for the district within which such award was made." 529 U.S. at 197, 120 S.Ct. 1331 (quoting 9 U.S.C. 9). One party argued that the statute was permissive in that it liberalized venue by adding another district in which confirmation could occur; the other party countered that the statute was restrictive in that it required confirmation to occur in the specified district. The Court expressly declined to resolve this issue based on the plain meaning of the statute:

> Enlightenment will not come merely from parsing the language, which is less clear then either party contends. Although "may" could be read as permissive in each section . . . the mere use of "may" is not necessarily conclusive of congressional intent to provide for permissive or discretionary authority. . . . Each party has a point, but neither point is conclusive.

*Id.* at 198-99, 120 S.Ct. 1331. Instead, the Court examined the statutory history and animating policy of the venue provisions of the FAA and determined that "may" was used in the permissive sense. *Id.* at 199-204, 120 S.Ct. 1331.

We find the Court's reasoning in Cortez Byrd Chips both persuasive and decisive. Even if read in the light most favorable to the Oil Companies, the plain language of the "may" provision in section 1304(b)(1) is not unequivocally permissive language. Rather, it is ambiguous, and an ambiguous

statute cannot waive sovereign immunity for post-judgment interest. See *Shaw*, 478 U.S. at 318, 106 S.Ct. 2957.

5

Seen in the light of the standards of legal review that we must apply to the question of whether Congress has waived the sovereign's right to refuse to pay interest, we think there necessarily is ambiguity in the meaning of the word "all" in section 1961(c)(2) and the phrase "except as provided in" in section 1961(b), as well as in the relationship between section 1961 and the Judgment Fund statute. Any of these ambiguities alone, given the legal test to be applied, is enough to defeat the claim to post-judgment interest made by the Oil Companies, as they candidly conceded at oral argument. The statutes cited by the Oil Companies do not offer an "unequivocal" waiver of sovereign immunity, *Mitchell*, 445 U.S. at 538, 100 S.Ct. 1349 (quoting *King*, 395 U.S. at 4, 89 S.Ct. 1501), for post-judgment interest sufficiently broad to encompass interest on the Oil Companies' contract judgment, especially when the statutes are strictly construed in favor of the sovereign, *Shaw*, 478 U.S. at 318, 106 S.Ct. 2957.

6

Given that sections 1961(c)(2) and 1961(b) are ambiguous, the legislative history of the FCIA is legally irrelevant: If Congress has left us with an ambiguous statute, no waiver of sovereign immunity can be found, regardless of what Congress may or may not have intended as a purpose for its statute. Nonetheless, lest there be any lingering doubt that perhaps Congress intended to depart from the historical narrow waiver of immunity for post-judgment interest (as unambiguously reflected in pre-FCIA law), the legislative history of the FCIA makes absolutely certain that Congress intended that the new statutes fashioned to make way for the new Federal Circuit were not to change the narrow waiver of immunity that preceded the FCIA. Subsections (c)(2) and (b)

of section 1961, as well as 31 U.S.C. § 1304(b), were enacted as part of the FCIA in 1982, and the FCIA's legislative history strongly suggests that Congress did not intend for these sections to constitute a broad waiver of sovereign immunity for interest on Federal Circuit judgments against the United States other than those judgments described in 31 U.S.C. § 1304(b)(1)(B).

As discussed above, prior to 1982, 28 U.S.C. § 2516(b) and 31 U.S.C. § 724a waived sovereign immunity only for claims for post-judgment interest on Court of Claims (now Federal Circuit) judgments against the United States that the United States sought to have reviewed in the Supreme Court. Although the FCIA's addition of 28 U.S.C. §§ 1961(b) and (c)(2) transformed these two formerly free-standing statutes into statutes referenced by the "except as provided in" provision of section 1961(b), the legislative history of the FCIA shows that Congress intended the FCIA to preserve the pre-existing interpretation of these two statutes with respect to post-judgment interest. *See generally Thompson*, 797 F.2d at 1022-26 (discussing the legislative history of the FCIA as relevant to whether 28 U.S.C. § 1961(a) waived sovereign immunity for post-judgment interest on all district court judgments against the United States); *Ulmet v. United States*, 19 Cl.Ct. 527, 537-38 (1990) (discussing the legislative history of 28 U.S.C. § 1961(c)(2) as relevant to whether post-judgment interest accrues on judgments of the Claims Court, now the United States Court of Federal Claims).

The original Senate bill contained language that would have made the United States liable for post-judgment interest on all judgments, "including judgments of the United States [Court of Federal Claims]." S. 1700, 97th Cong., 1st Sess. § 302(a)(3), 127 *Cong. Rec.* 23,093 (1981). This sweeping potential change to the law was brought to the attention of Congress in a letter from Mr. Stockman, then the Director of the Office of Management and Budget, that advocated for

maintaining the "status quo." 127 *Cong. Rec.* 29,865-66 (Dec. 8, 1981) (noting that under the then-current regime "the Federal Government only pays post-judgment interest when it appeals from a Court of Claims judgment to the Supreme Court and loses" and advocating an amendment to "maintain the status quo" under which "interest [would] be paid only during the pendency of unsuccessful appeals to the Supreme Court"). In response to Mr. Stockman's letter, Senator Grassley introduced an amendment to the Senate bill containing essentially the language now found in 28 U.S.C. § 1961(c)(2) and stated that "the amendment . . . retain[s] the status quo with respect to accumulation of interest on judgments of the Court of Claims," now the Federal Circuit. *Id.* at 29,865.

IV

Because the statutes cited by the Oil Companies do not demonstrate an unequivocal waiver of sovereign immunity from the Oil Companies' claim for post-judgment interest on their contract judgment, no waiver of sovereign immunity has occurred for the post-judgment interest they seek. We affirm the dismissal of the Oil Companies' complaint by the United States Court of Federal Claims.

COSTS

No costs.

AFFIRMED.

PROST, *Circuit Judge*, dissenting.

I respectfully dissent from the majority opinion. The majority concludes that sovereign immunity is not waived based on its finding that 28 U.S.C. § 1961(c)(2) is subject to two plausible readings. In my view, however, there is only *one* plausible reading of the statutory language at issue. It is the reading that maintains that "interest shall be allowed on *all* final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in [§ 1961(a)] and as provided in [§ 1961(b)]." 28 U.S.C. § 1961(c)(2) (emphasis added).

I

The majority errs in reading § 1961(c)(2) as providing a second "plausible" reading for at least four reasons. First, as the majority notes in its discussion of the appellants' arguments, "all" means "all." There is no language in the statute that limits "all" to a specific subset of cases or that creates ambiguity where none exists.

Second, the majority also attempts to trace a path through § 1961(b) that would create ambiguity in § 1961(c)(2). But § 1961(b) merely discusses *how* interest is to be calculated—not whether it is available at all. The § 1961(b) method of computation is to be used "*except* as provided in section 2516(b) [of title 28] and section 1304(b) of title 31." 28 U.S.C. § 1961(b) (emphasis added). And here, "except" means "except." The majority's second "plausible" reading of the statute effectively requires amending "except as provided in" to read "subject to." It is simply not in our power to amend the text of Congressional statutes in such a way.

Third, the majority's reading of § 1961(c)(2) as having a second "plausible" meaning renders significant portions of the statute superfluous. This violates a central canon of statutory construction. *See Freytag v. C.I.R.*, 501 U.S. 868, 877, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (courts should have "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment") (internal quotations and citations omitted). As the Supreme Court has said, "[i]t is . . . not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217-18, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) (emphasis in the original).

Fourth, and finally, the majority is incorrect when it implies that the literal reading of § 1961(c)(2) cannot be given effect because it is supported by "nary a word" of legislative history. Clear statutes need not be supported by legislative history in order to be given effect. To deny a clear statute its force based on the absence of legislative history would be an example of the tail wagging the dog.

II

The majority also rests its conclusion that there is no sovereign immunity waiver on the alternative ground that 31 U.S.C. § 1304 does not provide an unambiguous waiver of sovereign immunity.[1] But it is highly doubtful that a separate statute can trump a clear waiver of sovereign immunity in another statute. In any event, the government has neither raised it as an independent basis for a judgment against the Oil Companies nor argued it before this court. Moreover, there is conflicting case law on whether or not § 1304 can serve as an additional barrier to recovery of post-judgment interest when it conflicts with another more specific statute.

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[1] *See* Part III.B.4 of the majority opinion.

In this case, therefore, § 1304 by itself does not appear to me sufficient to create ambiguity regarding 28 U.S.C. § 1961 (c)(2).

For the aforementioned reasons, I respectfully dissent.

**APPENDIX B**

UNITED STATES COURT OF FEDERAL CLAIMS

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No. 02-102C

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MARATHON OIL COMPANY and MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
*Plaintiffs*,

v.

THE UNITED STATES,
*Defendant.*

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June 19, 2003

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OPINION

MEROW, *Senior Judge.*

This is a claim for post-judgment interest. The plaintiffs seek interest of approximately $1.446 million each on a judgment against the United States in the U.S. Court of Appeals for the Federal Circuit, computed from December 28, 2000, the date judgment was entered, to May 1, 2001, the date plaintiffs received payment of their awards. Plaintiffs assert that they are entitled to recover interest on the Federal Circuit's judgment under 28 U.S.C. § 1961(c)(2), which allows interest on "final judgments" by that court. Defendant moves to dismiss the complaint on the ground that the Court of Federal Claims lacks jurisdiction to entertain this action. In particular, defendant asserts that the United States has not waived its sovereign immunity to the plaintiffs' suit for post-judgment interest. The court determines that it does have

jurisdiction of the case under the Tucker Act because the plaintiffs' action constitutes a claim for money against the United States "founded . . . . upon . . . . [an] Act of Congress." 28 U.S.C. § 1491(a). But the court agrees with defendant that the claim is meritless because the act in question, 28 U.S.C. § 1961(c)(2), does not waive the government's sovereign immunity to post-judgment interest on the judgment at issue here.

*FACTUAL AND PROCEDURAL BACKGROUND*

This case has its genesis in contracts that the plaintiffs, Marathon Oil Company ("Marathon") and Mobil Oil Exploration and Producing Southeast, Inc. ("Mobil"), entered into with the United States more than twenty years ago to explore and develop oil and gas leases on the outer continental shelf off the coast of North Carolina. The United States has jurisdiction, control, and power of disposition over submerged lands on the outer continental shelf that extend beyond state-owned submerged lands. See 43 U.S.C. §§ 1301 *et seq*. Under the Outer Continental Shelf Lands Act ("OCSLA") the Secretary of the Interior is empowered to sell leases that "entitle the lessee to explore, develop, and produce the oil and gas contained within the leased area, conditioned upon" various applicable requirements. 43 U.S.C. § 1337(b). In 1981, pursuant to OCSLA, Marathon and Mobil paid more than $78 million apiece to the United States for oil and gas leases in five tracts off the coast of North Carolina.

In 1990 the federal government enacted the Outer Banks Protection Act ("OBPA"), P.L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (Aug. 18, 1990), which substantially altered the statutory scheme for issuance of the permits required to explore and develop the tracts. The effect of the OBPA was to impair the plaintiffs' rights under their lease contracts. In 1992 Marathon and Mobil joined a lawsuit in the Court of Federal Claims filed by other companies with oil and gas

leases similarly impaired by the OBPA. The complaints alleged that the United States had breached the lease agreements and demanded restitution of the amounts the plaintiffs paid for the leases in 1981. In April 1996 the court found the United States liable for breach of its lease contracts. See *Conoco, Inc. et al. v. United States*, 35 Fed.Cl. 309, 336 (Fed.Cl.1996). After a series of subsequent proceedings the court issued separate orders on July 18, 1997 (filed on July 24, 1997) directing the entry of judgment in favor of Marathon in the amount of $78,242,368.59 and partial judgent in favor of Mobil in the amount of $78,257,565.00.

The United States appealed the Court of Federal Claims judgments to the Federal Circuit, which reversed on May 13, 1999. See *Marathon Oil Co. v. United States*, 177 F.3d 1331, 1340 (Fed.Cir.1999). The Court of Federal Claims thereupon vacated its judgments on May 28, 1999, and entered a new judgment in favor of defendant on June 1, 1999. The plaintiffs appealed the Federal Circuit decision to the Supreme Court, which granted a writ of certiorari and, in a ruling issued on June 26, 2000, reversed the Federal Circuit and remanded the case for further proceedings. See *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 624, 120 S.Ct. 2423, 147 L.Ed.2d 528 (2000). The Supreme Court held that "the government broke its promise; it repudiated the contracts; and it must give the companies their money back." *Id.* at 607, 120 S.Ct. 2423.

On remand the Federal Circuit issued a new opinion on December 28, 2000, in which it rejected the government's argument that the plaintiffs' awards should be reduced by the decreased value of the leases at the time of breach[1] and

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[1] As the Federal Circuit observed in its opinion, the Court of Federal Claims had reached the same conclusion in its 1997 judgments in which it "rejected the government's argument that any restitution should be offset by the asserted reduction in the market value of the leases due to the reduced price of oil and gas at the time of the government's breach."

affirmed the prior judgments of the Court of Federal Claims from July 1997. See *Marathon Oil Co. v. United States*, 236 F.3d 1313 (Fed.Cir.2000). The United States filed a petition for rehearing by the Federal Circuit panel. By order dated February 16, 2001, the Federal Circuit denied the petition for rehearing and stated that the court's mandate would issue on February 23, 2001.

On February 27, 2001, the Court of Federal Claims ordered that its judgments for the plaintiffs from July 1997 be reinstated, effective as of their original dates, awarding $78,242,368.59 to Marathon and $78,257,565.00 to Mobil. The clerk of court entered judgment on February 28, 2001. The plaintiffs then wrote letters to the Judgment Fund Group, Department of the Treasury ("Treasury"), on March 2, 2001 (Marathon) and March 16, 2001 (Mobil) requesting payment of their awards. The letters were submitted to Treasury by plaintiffs' counsel in separate cover letters dated March 2, 2001, and March 19, 2001, respectively, along with the original transcripts of the judgments. Neither plaintiff requested in its letter to Treasury that interest be paid on its award. Nor did plaintiffs' counsel make any such request. On March 28, 2001, the Department of Justice ("DoJ") sent a letter to Treasury enclosing the two final judgments of the Court of Federal Claims and stating that no further judicial review would be sought. DoJ requested that the awards be certified and paid, without interest, from the Judgment Fund established by 31 U.S.C. § 1304. Marathon and Mobil received payment of their awards on May 1, 2001.

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*Marathon Oil Co. v. United States*, 236 F.3d at 1315 (Fed.Cir.2000). The Federal Circuit found that the Supreme Court had ruled on this issue as well, citing the following language from its decision: "the law entitles the companies to . . . . restitution whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore." *Id.* at 1315 (quoting *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. at 623- 24, 120 S.Ct. 2423).

On June 8, 2001, the plaintiffs submitted another letter to the Judgment Fund Group, Department of the Treasury, demanding payment of post-judgment interest at the rate specified in 28 U.S.C. § 1961(a), computed daily from December 28, 2000, the date of the Federal Circuit's judgment on remand from the Supreme Court, to May 1, 2001, the date of payment. According to plaintiffs, 28 U.S.C. § 1961(a) prescribes an annual interest rate of 5.44 % on their awards, thus entitling Marathon to post-judgment interest in the amount of $1,446,004.72 and Mobil to post-judgment interest of $1,446,285.56. By letter dated August 28, 2001, however, DoJ, acting on behalf of Treasury, denied the claims for post-judgment interest. The letter stated that "the government has only waived sovereign immunity to interest upon a judgment of the Federal Circuit when the Supreme Court has affirmed the judgment upon petition by the United States," a situation that did not apply in the case at bar because it was not the government who appealed the Federal Circuit's judgment to the Supreme Court.

Marathon and Mobil filed their complaint in the Court of Federal Claims on February 5, 2002, alleging that the government's refusal to pay post-judgment interest violates 28 U.S.C. § 1961(c)(2). The issue is presented to the court on defendant's motion to dismiss and plaintiffs' opposition thereto. The briefs are comprehensive and oral argument is not required.

*DISCUSSION*

It is a fundamental doctrine of law that money damages cannot be recovered from the United States unless the government has waived its sovereign immunity. With particular respect to interest, the Supreme Court has stated that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library*

*of Congress v. Shaw*, 478 U.S. 310, 314, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). See also *United States v. N.Y. Rayon Importing Company*, 329 U.S. 654, 658-59, 67 S.Ct. 601, 91 L.Ed. 577 (1947) ("[I]in the absence of constitutional requirements [i.e., the Fifth Amendment guarantee of "just compensation" for the public taking of private property], interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. And Congress has indicated . . . . that its consent can take only two forms: (1) a specific provision for the payment of interest in a statute; (2) an express stipulation for the payment of interest in a contract duly entered into by agents of the United States.") This doctrine is well recognized in the Federal Circuit. See *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed.Cir.1993) ("Interest may not be recovered against the government in the absence of an explicit waiver of sovereign immunity for that purpose"); *Zumerling v. Marsh*, 783 F.2d 1032, 1034 (Fed.Cir.1986) ("'[e]xpress consent to the payment of interest must be found in either a special statute or an express contractual provision. The intent by Congress to permit the recovery of interest cannot be implied,' and must be strictly construed." (quoting *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1383 (Fed.Cir.), *cert. denied*, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 103 (1983)).)

A.

Plaintiffs contend that 28 U.S.C. § 1961(c)(2) constitutes an express waiver of sovereign immunity entitling them to post-judgment interest on their awards. The statute reads as follows:

> Except as otherwise provided in paragraph (1) of this subsection [which applies only to tax cases], *interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for*

> *the Federal Circuit,* at the rate provided in subsection (a) and as provided in subsection (b).[2]

28 U.S.C. § 1961(c)(2) (2000) (emphasis added). The threshold question before the Court of Federal Claims is whether the ruling plaintiffs received from the Federal Circuit on December 28, 2000, was a "final judgment" of that court within the meaning of the statute. If not, then there has been no waiver of sovereign immunity with respect to the payment of interest in this case.

As explained by this court in *Ulmet v. United States*, 19 Cl.Ct. 527, 534 (1990), the term "final judgment" means a judicial ruling which "determines the rights of the parties and disposes of all of the issues involved so that no further action by the court will be necessary in order to settle and determine the entire controversy." (Quoting Black's Law Dictionary 567 (5th ed.1979).) After a careful reading of the Federal Circuit's opinion of December 28, 2000, this court holds it was not a "final judgment" of the appellate court within the meaning of 28 U.S.C. § 1961(c)(2). In the opening paragraph of the Federal Circuit's four-page opinion, the court noted that its prior decision (denying the plaintiffs' claims) had been reversed by the Supreme Court. Accordingly, the Federal Circuit was "now apply[ing] the [Supreme] Court's ruling to the *judgments of the Court of Federal Claims*, and affirm[ing] the *judgments of that court*." Complaint, Exh. C at 1 (emphasis added). In the final paragraph of its opinion,

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[2] "The rate provided in subsection (a)" refers to the following statutory language: "[I]nterest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961(a). "[A]s provided in subsection (b)" refers to the following statutory language: "Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually." 28 U.S.C. § 1961(b).

the Federal Circuit stated that "*[t]he Court of Federal Claims awarded* $78,242,368.59 to Marathon . . . . [and] $78,257,565.00 to Mobil. *The calculation of these amounts is not in dispute* . . . . The *judgments of the Court of Federal Claims* are affirmed." *Id.* at 4 (emphasis added). Though the Federal Circuit's clerk of court entered "Judgment" in the case the same day, that document likewise stated that "[t]he judgments of the Court of Federal Claims are affirmed." Defendant's Motion to Dismiss ("Motion to Dismiss"), Apx. at 1.

Thus, the language of the Federal Circuit's opinion and judgment, both dated December 28, 2000, clearly state that the court was affirming the prior judgments of the Court of Federal Claims, not substituting its own judgment. It was the Court of Federal Claims that decided, in 1997, that Marathon and Mobil were entitled to awards, and it was the Court of Federal Claims that determined the amounts of those awards. The Federal Circuit played no part in reaching those decisions. It merely ratified the work of the trial court, pursuant to the Supreme Court's remand, three and a half years later. In short, the Federal Circuit had no substantive input in the judgments of the Court of Federal Claims.

Furthermore, following the issuance of the Federal Circuit's mandate on February 23, 2001, it was the Court of Federal Claims that issued the order, on February 27, 2001, formally reinstating its earlier judgments. In the words of the Court of Federal Claims, "it is ORDERED that . . . . the judgments in favor of plaintiffs dated July 24, 1997 . . . . awarding $78,242,368.59 to plaintiff Marathon and $78,257,565.00 to plaintiff Mobil, be REINSTATED effective as of their original dates." Motion to Dismiss, Apx. at 4 (emphasis in the original). The clerk of the Court of Federal Claims entered "Judgment" the following day, February 28, 2001, stating that "[p]ursuant to the court's Order [of February 27, 2001] . . . . IT IS ORDERED AND ADJUDGED this

date . . . . that the judgments of this court in favor of plaintiffs dated July 24, 1997 . . . . are reinstated and shall be effective as of their original dates." *Id.* at 5 (emphasis in the original). Thus, it was the Court of Federal Claims, not the Federal Circuit, that issued the final judgments in this case by reinstating the monetary judgments it initially issued to Marathon and Mobil in 1997.

In their letters to Treasury in March 2001 requesting payment both plaintiffs identified the Court of Federal Claims, not the Federal Circuit, as the court of judgment. Thus, under a caption referring to the case as "No. 92-331C (U.S. Court of Federal Claims)," Marathon wrote that "[y]ou [Treasury] have been presented with a judgment in the above-captioned proceeding awarding Marathon Oil Company $78,242,368.59." Motion to Dismiss, Apx. at 9. Furthermore, Marathon referred to the court's judgment as final. ("This is a final judgment and no further review will be sought by Marathon . . . ." *Id.*) Mobil's letter to Treasury was the same in every pertinent respect as Marathon's. It identified the case as "No. 92-331C (U.S. Court of Federal Claims)" and stated that "[y]ou have been presented with a judgment in the above-captioned proceeding awarding Mobil Oil Exploration & Producing Southeast, Inc. $78,257,565.00." *Id.* at 12. Mobil's letter likewise referred to the court's judgment as final. ("This is a final judgment and no further review will be sought by Mobil . . . ." *Id.*) Nowhere in either letter did the plaintiffs mention the Federal Circuit, cite the case number of the appeal before the Federal Circuit, or refer to the monetary judgments they had received as final judgments of the appellate court. To the contrary, each plaintiff identified the monetary judgment it had received by the case number in the Court of Federal Claims. Thus, they evidently had this court in mind when they referred to their respective awards as a "final judgment."

In the separate letters plaintiffs' counsel submitted to Treasury in March 2001, which enclosed the original transcripts of the judgments and copies of the plaintiffs' own letters to Treasury, the cases were likewise captioned as "No. 92-331 (United States Court of Federal Claims)." Plaintiffs' counsel did not mention the Federal Circuit nor cite the case number of the appeal before the Federal Circuit in either letter. Nor did plaintiffs' counsel refer to the monetary judgments plaintiffs had received as final judgments of the appellate court. Reading the letters of plaintiffs' counsel in conjunction with the plaintiffs' own letters to Treasury, discussed above, it is clear to this court that the judgments plaintiffs' counsel submitted to Treasury—on which payment was requested—were those of the Court of Federal Claims, not the Federal Circuit.

Indeed, had plaintiffs or their counsel believed that the Federal Circuit's opinion on December 28, 2000, and the judgment entered by the clerk of court that day, constituted a "final judgment" within the meaning of 28 U.S.C. § 1961 (c)(2), they would presumably have written to Treasury requesting payment of their awards at that time. The fact that they did not do so until after the Court of Federal Claims reinstated its prior monetary judgments two months later is indicative of which rulings they actually considered to be the "final judgments."

Lastly, the Department of Justice letter to Treasury on March 28, 2001, certifying the amounts of the awards to Marathon and Mobil, leaves no doubt that they were payable to the plaintiffs pursuant to final judgments of the Court of Federal Claims, not the Federal Circuit. The pertinent language of the DoJ letter, signed by the Director of the Commercial Litigation Branch, reads as follows: "I certify that the amounts stated in the *enclosed two final judgments dated July 24, 1997, and reinstated on February 28, 2001*, are payable by the United States." Motion to Dismiss, Apx. at 13

(emphasis added). The judgments bearing those two dates were issued by the Court of Federal Claims, not the Federal Circuit.

Thus, all of the players in this drama—Marathon, Mobil, plaintiffs' counsel, DoJ, and Treasury—treated the Court of Federal Claims judgments of July 24, 1997, reinstated on February 28, 2001, as the basis for the monetary awards in this action. In the parties' correspondence with Treasury prior to payment of the awards on May 1, 2001, both sides identified the rulings of the Court of Federal Claims as "final judgments." Yet plaintiffs propose the court ignore that history and transfer the label of "final judgment" in this action to the Federal Circuit ruling of December 28, 2000. No viable basis for such a transfer has been shown.

The court finds that the plaintiffs received their awards in this case pursuant to final judgments of the Court of Federal Claims, not the U.S. Court of Appeals for the Federal Circuit. The opinion and "judgment" of the Federal Circuit on December 28, 2000 was not a "final judgment" within the contemplation of 28 U.S.C. § 1961(c)(2), but an antecedent to the final judgments reinstated by the Court of Federal Claims on February 28, 2001. Therefore, the statute allowing interest on final judgments of the Federal Circuit, 28 U.S.C. § 1961 (c)(2), does not apply to the final judgments for Marathon and Mobil in this case and does not waive the sovereign immunity of the United States from the payment of interest on plaintiffs' awards.

B.

Even if the court were to find that the final judgment in this action was issued by the Federal Circuit, the plaintiffs would still not be entitled to post-judgment interest on their awards under 28 U.S.C. § 1961(c)(2). To accurately interpret this provision it must be read in conjunction with the entire statutory section in which it is embedded. 28 U.S.C. § 1961—

entitled "Interest"—deals broadly with the allowance and computation of interest on money judgments in federal courts, including district court civil cases, the Federal Circuit, and the Court of Federal Claims. The pertinent parts of the section read as follows:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . . Such interest shall be calculated from the date of the entry of the judgment at a rate equal to the weekly average 1-year constant maturity Treasury yield . . . . for the calendar week preceding the date of judgment.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.
>
> (c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the . . . . rate of . . . .
>
> (c)(2) Except as otherwise provided in paragraph (1) of this subsection, *interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit at the rate provided in subsection (a) and as provided in subsection (b).*
>
> (c)(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.
>
> (c)(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

28 U.S.C. § 1961(a)-(c) (2000) (emphasis added).

With respect to 28 U.S.C. § 1961(c)(2), therefore, interest is allowable on final judgments of the Federal Circuit at the same rate as interest on district court civil judgments under 28 U.S.C. § 1961(a) and "as provided in subsection (b)" [28 U.S.C. § 1961(b)].[3] That subsection, as quoted above, provides for the daily computation of interest until the judgment is paid "*except* as provided in *section 2516(b) of this title and section 1304(b) of title 31.*" 28 U.S.C. § 1961(b) (2000) (emphasis added). The first "exception" in subsection (b) provides, in pertinent part, as follows:

> Interest on a *judgment* against the United States *affirmed by the Supreme Court after review on petition of the United States* is paid at a rate equal to [the rate at which interest is paid on district court civil judgments, as stated in 28 U.S.C. § 1961(a), *supra*].

28 U.S.C. § 2516(b) (2000) (emphasis added). The only kind of judgment which fits that language is a money judgment for plaintiff by the Federal Circuit which is appealed by the government to the Supreme Court and upheld for plaintiff. The second exception in subsection (b)—which is part of the Judgment Fund statute—provides, in pertinent part, as follows:

> *Interest* may be paid from the appropriation made by this section . . . . *on a judgment of the* Court of Appeals for the *Federal Circuit or* the United States *Court of Federal Claims under section 2516(b) of title 28,* only *from* the *date of filing* of the transcript of *the judgment* with the Secretary of the Treasury *through* the day before the *date of the mandate of affirmance.*

31 U.S.C. § 1304(b)(1)(B) (2000) (emphasis added). The only types of judgments fitting that language are money judgments for plaintiffs (a) by the Federal Circuit or (b) by the Court of

---

[3] The subsection does not apply to any judgments against the United States in tax cases.

Federal Claims *and* (on appeal therefrom) by the Federal Circuit, which are appealed by the government to the Supreme Court and upheld for plaintiffs.

The court finds the foregoing statutory language ambiguous with respect to whether the "exceptions" cited above in 28 U.S.C. § 1961(b)—*i.e.*, 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b)(1)(B)—are meant to limit the *allowance* of post-judgment interest (a plaintiff's fundamental entitlement thereto, in other words) exclusively to those Federal Circuit judgments against the United States which are affirmed by the Supreme Court after appeal by the government, or whether the exceptions are meant simply to modify the time period for the *computation* of post-judgment interest on a discrete subset of Federal Circuit judgments—those that are appealed by the government to the Supreme Court and affirmed for plaintiffs. To help resolve this ambiguity it is appropriate to examine the legislative history of the relevant statutes.

Historically, 28 U.S.C. § 2516(b) limited the payment of interest by the Federal Circuit's predecessor, the U.S. Court of Claims, in the exact manner the statute does today with respect to the Federal Circuit—namely, to "judgment[s] against the United States affirmed by the Supreme Court after review on petition of the United States." 28 U.S.C. § 2516(b) (1976). See also *Ulmet, supra*, 19 Cl.Ct. at 538. Thus, plaintiffs were entitled to interest only if they received an award from the Court of Claims which was appealed by the government to the Supreme Court and upheld for plaintiffs by the high court. In addition, § 724a of the Judgment Fund statute limited the time period for the payment of interest in roughly the same manner as today's successor statute, § 1304(b)(1)(B). See 31 U.S.C. § 724a (1976 Supp. IV 1980).

When Congress was deliberating the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 Stat. 25—which established the U.S. Court of Appeals for the Federal Circuit

(by merging the appellate functions of the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals), created the U.S. Claims Court (now the Court of Federal Claims) out of the trial division of the Court of Claims, and enacted, *inter alia*, the "Interest" provisions codified in 28 U.S.C. § 1961(b) and (c)—a proposal was considered which would have expanded the government's liability for interest on judgments against the United States. In particular, the proposal would have extended the liability of the United States for post-judgment interest to all adverse judgments of the new U.S. Claims Court (except tax cases) if the United States appealed those judgments to the Federal Circuit and failed to prevail. See *Ulmet, supra*, 19 Cl.Ct. at 537-38; *Thompson v. Kennickell,* 797 F.2d 1015, 1022-23 (D.C. Cir.1986). The legislative history of the Act indicates that Congress decided against expanding the government's waiver of sovereign immunity in that manner, and dropped the proposal. *Id.* As observed by this court in *Ulmet,* "[i]t appears that the intent of Congress in promulgating what is now 28 U.S.C. § 1961(c)(2) (1982) was to permit the payment of interest only in those cases in which an adverse judgment is rendered against the government by the United States Court of Appeals for the Federal Circuit and appealed [unsuccessfully] to the United States Supreme Court, unless otherwise provided for by an express waiver of sovereign immunity in a separate statute . . . . " *Id.* at 538. See also *Thompson v. Kennickell, supra*, 797 F.2d at 1022-25.

Thus, the Federal Courts Improvement Act preserved the status quo by retaining in the new Federal Circuit the historically narrow waiver of sovereign immunity that applied in the old Court of Claims for the payment of interest on money judgments against the government—namely, to judgments against the United States that are appealed to the Supreme Court and affirmed for the plaintiffs. That is not the situation in the case at bar. Here, the Federal Circuit held for the United States, overturning a judgment for plaintiffs in the

Court of Federal Claims. So it was *plaintiffs* who petitioned for review by the Supreme Court, not the *United States* as required fo interest to be allowed on a judgment under 28 U.S.C. § 1961(c)(2) and paid in accordance with 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b)(1)(B).

Plaintiffs argue that 28 U.S.C. § 1961(b), cross-referenced in 28 U.S.C. § 1961(c)(2), should be interpreted as mandating the payment of interest on their awards because the provision applies to all judgments against the government *except* as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b)—*i.e.,* to all judgments, like the ones at issue here, that were *not* "affirmed by the Supreme Court after review on petition of the United States." 28 U.S.C. § 2516(b). As previously discussed, however, the court does not agree with the plaintiffs' interpretation of subsection (b). It is telling, in the court's view, that plaintiffs are unable to cite any case law supporting their interpretation of this subsection. The crucial fact is that 28 U.S.C. § 1961(b) deals with the *computation* of interest on a judgment, not the question of *entitlement* to such interest. The exceptions in that subsection apply equally to the computation of interest, not entitlement thereto. Accordingly, the applicability of subsection (b) presupposes that the plaintiffs are entitled to interest on the judgments in question. But Marathon and Mobil have not established their entitlement to any such interest because they cannot demonstrate a waiver of sovereign immunity by the government. Thus, 28 U.S.C. § 1961(b) is useless to the plaintiffs.

In summation, even if the monetary judgments Marathon and Mobil received in this case were deemed to be "final judgments" of the Federal Circuit, the plaintiffs would not be entitled to post-judgment interest thereon because the judgments to not satisfy the requirements for a waiver of sovereign immunity set forth in 28 U.S.C. § 1961(c)(2).

C.

Since the final judgments in this case were issued by the Court of Federal Claims, the basic statute governing the allowability of interest is 28 U.S.C. § 2516(a), which provides as follows:

> Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.

28 U.S.C. § 2516(a) (2000). In the case at bar, neither plaintiff alleges that its lease agreement with the United States contains a provision allowing for interest on a monetary judgment. Nor have plaintiffs cited any statutory authority entitling them to interest on their monetary judgments against the United States. So there has been no waiver of sovereign immunity by the United States allowing for interest in this case, as required under 28 U.S.C. § 2516(a).

Another statutory provision addressing the allowance, computation, and payment of interest on judgments of this court, enacted as part of the Federal Courts Improvement Act of 1982, *supra,* is 28 U.S.C. § 1961(c)(3). It provides as follows:

> Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

28 U.S.C. § 1961(c)(3) (2000). The "paragraph (1)" referenced therein deals with tax cases, which leaves "any other provision of law" as the only possible source of a waiver of sovereign immunity from the payment of interest in this case. The plaintiffs have not cited any such provision of law, however, and the court has no knowledge of any. Indeed, the plaintiffs pointedly reject 28 U.S.C. § 1961(c)(3) as a basis for their claim, stating that they "are not seeking interest

under that provision." Plaintiffs' Opposition to Motion to Dismiss at 5 (note 1).

Consistent with the absence of any waiver of sovereign immunity in this case, the DoJ letter to Treasury of March 28, 2001, specifically indicated that *no interest* was to be paid on the principal amounts awarded to Marathon and Mobil by the Court of Federal Claims. A copy of the letter was sent to plaintiffs' counsel. So the plaintiffs were on notice in late March 2001 that DoJ was certifying their awards for payment without interest, and there is no evidence that they objected thereto prior to Treasury's payment of the awards ($78,242,368.59 to Marathon and $78,257,565.00 to Mobil) on May 1. Plaintiffs' initial approach, discernable in their letters to Treasury in March 2001, that the final judgments had been issued by the Court of Federal Claims, not the Federal Circuit, and did not accrue interest was valid. Plaintiffs' subsequent June 8, 2001, request for interest from December 28, 2000, the date of the asserted Federal Circuit judgment, to May 1, 2001, the date of payment lacks requisite statutory support.

*CONCLUSION*

For the reasons discussed herein the court concludes that the plaintiffs are not entitled to the post-judgment interest they seek on their money judgments from the Court of Federal Claims.

The clerk is ordered to enter JUDGMENT for defendant and DISMISS the complaint.

Each party shall bear its own costs.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed October 7, 2004]

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No. 03-5147

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MARATHON OIL COMPANY and MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
*Plaintiffs-Appellants*,

v.

UNITED STATES,
*Defendant-Appellee.*

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ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and a response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 14, 2004.

Circuit Judge SCHALL and Circuit Judge BRYSON did not participate in the vote.

FOR THE COURT,

/s/ Jan Horbaly/JB
JAN HORBALY
Clerk

Dated: October 7, 2004

Cc: Griffith L. Green
Mark A. Melnick

MARATHON OIL COMPANY V US, 03-5147
(CFC-02-CV-102)

# APPENDIX D

## FEDERAL STATUTES

### 28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding.[1] the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1986.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit,[2] at the rate provided in subsection (a) and as provided in subsection (b).

---

[1] So in original. The period probably should not appear.

[2] So in original. Probably should be "Circuit,".

(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

(June 25, 1948, c. 646, 62 Stat. 957; Apr. 2, 1982, Pub.L. 97-164, Title III, § 302(a), 96 Stat. 55; Sept. 13, 1982, Pub.L. 97-258, § 2(m)(1), 96 Stat. 1062; Jan. 12, 1983, Pub.L. 97-452, § 2(d)(1), 96 Stat. 2478; Oct. 22, 1986, Pub.L. 99-514, § 2, Title XV, § 1511(c)(17), 100 Stat. 2095, 2745; Oct. 29, 1992, Pub.L. 102-572, Title IX, § 902(b)(1), 106 Stat. 4516; Dec. 21, 2000, Pub.L. 106-554, § 1(a)(7) [Title III, § 307(d)(1)], 114 Stat. 2763, 2763A-636.)

**28 U.S.C. § 2516. Interest on claims and judgments**

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

(June 25, 1948, c. 646, 62 Stat. 978; Sept. 3, 1954, c. 1263, § 57, 68 Stat. 1248; Apr. 2, 1952, Pub.L. 97-164, Title I, § 139(j)(2), Title III, § 302(d), 96 Stat. 43, 56; Sept. 13, 1982, Pub.L. 97-258, § 2(g)(5), (m)(3), 96 Stat. 1061, 1062; Oct. 29, 1992, Pub.L. 102-572, Title IX, § 902(a)(1), 106 Stat. 4516; Dec. 21, 2000. Pub.L. 106-554, § 1(a)(7) [Title III, § 307(d)(2)], 114 Stat. 2763, 2763A-636.)

**31 U.S.C. § 1304. Judgments, awards, and compromise settlements**

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

(1) payment is not otherwise provided for;

(2) payment is certified by the Secretary of the Treasury; and

(3) the judgment, award, or settlement is payable—

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473).

(b)(1) Interest may be paid from the appropriation made by this section—

(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance; or

(B) on a judgment of the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the

Secretary of the Treasury through the day before the date of the mandate of affirmance.

(2) Interest payable under this subsection in a proceeding reviewed by the Supreme Court is not allowed after the end of the term in which the judgment is affirmed.

(c)(1) A judgment or compromise settlement against the Government shall be paid under this section and sections 2414, 2517, and 2518 of title 28 when the judgment or settlement arises out of an express or implied contract made by—

(A) the Army and Air Force Exchange Service;

(B) the Navy Exchanges;

(C) the Marine Corps Exchanges;

(D) the Coast Guard Exchanges; or

(E) the Exchange Councils of the National Aeronautics and Space Administration.

(2) The Exchange making the contract shall reimburse the Government for the amount paid by the Government.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 917; Pub.L. 97-258, § 2(m)(2), Sept. 13, 1982, 96 Stat. 1062; Pub.L. 102-572, Title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub.L. 104-316, Title II, § 202(m), Oct. 19, 1996, 110 Stat. 3843.)

(2)

Supreme Court, U.S.
FILED
APR 0 - 2005
OFFICE OF THE CLERK

No. 04-923

# In the Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the waiver of sovereign immunity in 28 U.S.C. 1961(c)(2) for post-judgment interest is limited to adverse judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States.

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# In the Supreme Court of the United States

No. 04-923

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 374 F.3d 1123. The opinion of the Court of Federal Claims (Pet. App. 34a-51a) is reported at 56 Fed. Cl. 768.

### JURISDICTION

The judgment of the court of appeals was entered on June 30, 2004. A petition for rehearing was denied on October 7, 2004 (Pet. App. 52a-53a). The petition for a writ of certiorari was filed on January 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

### STATEMENT

1. In 1997, the Court of Federal Claims issued a judgment against the United States awarding damages to Mobil Oil Exploration and Producing Southeast, Inc.

(petitioner) and the Marathon Oil Company (Marathon) for breach of contract. Pet. App. 36a. The Federal Circuit reversed. *Ibid.* This Court granted the companies' petition, reversed the court of appeals' judgment, and remanded the case to that court for further proceedings. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000).

On remand, the court of appeals affirmed the judgments of the Court of Federal Claims awarding damages to the companies. *Marathon Oil Co.* v. *United States*, 236 F.3d 1313 (Fed. Cir. 2000). The Court of Federal Claims subsequently reinstated its judgments awarding damages to the companies, effective as of their original date. Pet. App. 37a.

Petitioner and Marathon then sought payment of their awards from the Department of Treasury. Pet. App. 37a. Both relied on the judgment of the Court of Federal Claims, rather than the judgment of the court of appeals, as the source for the award. *Id.* at 42a. Neither sought post-judgment interest. *Id.* at 37a. The United States informed the Department of the Treasury that the government would not seek further review and requested that the awards be certified and paid from the Judgment Fund. *Ibid.* The judgments were subsequently paid to petitioner and Marathon. *Ibid.*

After receiving their awards, petitioner and Marathon sought from the Department of the Treasury post-judgment interest running from the date of the court of appeals' judgment on remand from this Court to the date of the payment of their awards. Pet. App. 38a. The United States denied post-judgment interest based on sovereign immunity. *Ibid.*

2. Petitioner and Marathon then filed suit in the Court of Federal Claims, seeking post-judgment in-

terest in reliance on 28 U.S.C. 1961(c)(2). Pet. App. 38a. That provision specifies that, except in tax cases, "interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit, at the rate provided in subsection (a) and as provided in subsection (b)."

The Court of Federal Claims rejected the companies' claim. Pet. App. 34a-51a. The court reasoned, *inter alia*, that Section 1961(c)(2) waives the United States' immunity from claims of post-judgment interest only with respect to judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States. *Id.* at 44a-49a. Because the United States had not petitioned for review of the court of appeals' judgment, the Court of Federal Claims explained, Section 1961(c)(2) did not authorize post-judgment interest in this case. *Id.* at 48a-49a.

3. The court of appeals affirmed, holding that Section 1961(c)(2) authorizes interest on a judgment issued by the Federal Circuit only when the judgment is affirmed by this Court after review on petition of the United States. Pet. App. 1a-33a. The court noted that before Congress enacted the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, 96 Stat. 25, which created the Federal Circuit, federal law authorized interest on a judgment against the United States issued by the Court of Claims (its predecessor) only when the judgment was affirmed by the Supreme Court after review on petition of the United States. Pet. App. 12a (citing 28 U.S.C. 2516(b) (1976)). While the companies argued that the FCIA broadened the waiver of sovereign immunity to encompass any judgment issued by the Federal Circuit, the court found it "nearly

beyond comprehension" that Congress would have made such a "sweeping change." *Id.* at 14a.

The court of appeals rejected the companies' argument that the language of 28 U.S.C. 1961(c)(2) unambiguously authorizes post-judgment interest on all Federal Circuit judgments against the United States. Pet. App. 15a. The court noted that Section 1961(c)(2) authorizes interest only "as provided in subsection (b)," and that Section 1961(b) authorizes daily computation of interest except as provided in two other provisions—28 U.S.C. 2516(b) and 31 U.S.C. 1304(b)—that address only judgments issued by the Federal Circuit that are affirmed by the Supreme Court after review on petition of the United States. Pet. App. 9a-11a. The court concluded that there are two plausible interpretations of the "except" clause. It might specify the method for calculating interest for one subset of a larger class of judgments against the United States for which post-judgment interest is available. Alternatively, it could specify the method for calculating interest on the only category of cases for which post-judgment interest is available against the United States. *Ibid.* Because a statute that is susceptible of a plausible reading under which sovereign immunity is not waived cannot be construed to waive sovereign immunity, the court concluded that Section 1961(c)(2) must be construed to authorize interest on a Federal Circuit judgment only when the judgment is affirmed by this Court after review on petition of the United States. *Id.* at 17a.

The court of appeals also concluded that the statutory cross-reference to 31 U.S.C. 1304(b), a provision of the Judgment Fund statute, provides additional support for its interpretation. Pet. App. 17a-19a. The court reasoned that since the Judgment Fund statute

appropriates funds for interest only on judgments affirmed by this Court after review on petition by the United States, the reference to Section 1304(b) could plausibly be viewed as limiting the United States' waiver of liability to that circumstance. *Id.* at 18a.

Finally, the court of appeals concluded that the legislative history of the FCIA makes clear that Congress did not intend to depart from the narrow waiver of immunity that preceded the FCIA. Pet. App. 28a-29a. The court explained that the Director of the Office of Management of Budget criticized the original bill on the ground that it would expand the waiver of immunity on post-judgment interest to include all judgments. Following that criticism, the language of the bill was changed to its current form, and the sponsor of the amendment explained that the change was designed to preserve the status quo on the accumulation of interest on judgments. *Id.* at 29a-30a.

Judge Prost dissented. Pet. App. 31a-33a. She concluded that the only plausible reading of Section 1961(c)(2) is that it provides for interest on all judgments issued by the Federal Circuit. *Ibid.*

## ARGUMENT

Petitioner contends that 28 U.S.C. 1961(c)(2) waives the United States' sovereign immunity from post-judgment interest on all judgments issued by the Federal Circuit. That contention is without merit. The court of appeals correctly held that Section 1961(c)(2) waives immunity only from post-judgment interest on judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States, and that holding does not conflict with any decision of

this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. a. The legal principles governing the availability of interest against the United States are well established. Absent "express congressional consent" to an award of interest, "the United States is immune from an interest award." *Library of Cong.* v. *Shaw*, 478 U.S. 310, 314 (1986). While any waiver of sovereign immunity must be construed "strictly in favor of the sovereign," there is an "added gloss of strictness" with respect to an award of interest. *Id.* at 318. There can be no waiver "by use of ambiguous language." *Ibid* (citation omitted). The waiver "must be express, and it must be strictly construed." *Ibid.* Applying that standard, the court of appeals correctly concluded that Section 1961(c)(2) authorizes post-judgment interest only on judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States.

The background to the enactment of Section 1961(c)(2) provides convincing support for that conclusion. Before the enactment of the FCIA, a party could recover post-judgment interest on a judgment issued by the Federal Circuit's predecessor, the United States Court of Claims, only when the judgment was affirmed by this Court after review on petition of the United States. 28 U.S.C. 2516(b)(1976). Interpreting Section 1961(c)(2) to authorize interest on all Federal Circuit judgments would therefore attribute to Congress an intention to dramatically expand the availability of an award of interest against the United States.

There is no evidence that Congress affirmatively sought to effect that kind of dramatic expansion of the monetary liability of the United States. To the contrary, the legislative history of Section 1961(c)(2) shows that

Congress sought to preserve the same rule on interest that had existed before its enactment. In response to a proposed Senate bill that would have greatly expanded the United States' liability for post-judgment interest, see S. 1700, Tit. III, § 302, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. 23,093 (1981), the Director of the Office of Management and Budget wrote to the Senate majority leader requesting an amendment to preserve the existing limitation on post-judgment interest. *Id.* at 29,865-29,866. In another letter, the Director confirmed that it had been agreed that "interest will acrue [*sic*] only during the pendency of appeals (from the new Court of Appeals of the Federal Circuit) to the Supreme Court." *Id.* at 29,866. Senator Grassley presented an amendment that embodied the agreement to "retain the status quo with respect to accumulation of interest on judgments of the Court of Claims." *Id.* at 29,865. Congress adopted the amendment, and the critical language in the amendment was carried over into 28 U.S.C. 1961 (c)(2). 127 Cong. Rec. at 29,865-29,867. Thus, Congress's intent in enacting Section 1961(c)(2) was not to expand broadly the government's liability for post-judgment interest, but rather to continue to limit its liability to those cases involving Federal Circuit judgments against the United States that are challenged unsuccessfully in this Court.

b. Petitioner contends that Section 1961(c)(2) effected a dramatic change from prior law because the plain language of the statute authorizes post-judgment interest "on all final judgments against the United States in the United States Court of Appals for the Federal [C]ircuit." Pet. 12 (quoting 28 U.S.C. 1961(c)(2)). That argument ignores the language in Section 1961(c)(2) specifying that interest is authorized

on such judgments only "as provided in subsection (b)." 28 U.S.C. 1961(c)(2). Subsection (b), in turn, provides that "[i]nterest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31." 28 U.S.C. 1961(b). Section 2516(b) authorizes post-judgment interest only on a "judgment against the United States affirmed by the Supreme Court after review on petition of the United States." 28 U.S.C. 2516(b). Section 1304(b) of Title 31 embodies the same limitation, because it authorizes interest only on a judgment "under section 2516(b) of title 28." 31 U.S.C. 1304(b).

Petitioner argues that the cross-references to 28 U.S.C. 2516(b) and 31 U.S.C. 1304(b) establish the method of calculating interest in the subset of cases against the United States covered by Section 1961(c)(2) in which the United States loses in the Federal Circuit, successfully petitions for certiorari, and loses in this Court, leaving the daily computation rule to govern other cases against the United States, such as this one. Pet. 13. But as the court of appeals explained, there is another plausible reading of the cross-references in the "except" clause: they establish the method of calculating interest for the only category of cases in which interest is authorized against the United States, leaving the daily computation rule to operate in non-government cases. In light of the principle that waivers of sovereign immunity must be strictly construed, and the background understanding that Section 1961(c)(2) would preserve existing law, the court of appeals correctly adopted that alternative interpretation.

The decision below is consistent with decisions of other circuits. In *Transco Leasing Corp.* v. *United States*, 992 F.2d 552, 554-555 (1993), the Fifth Circuit

explained that, in light of Section 1961(c)(2)'s reference to subsection (b), "postjudgment interest awarded against the United States under section 1961 is subject to the limitations of section 1304(b)." Similarly, in *Thompson* v. *Kennickell*, 797 F.2d 1015, 1022 n.4 (1986), the D.C. Circuit observed that, "under 28 U.S.C. § 1961(c)(2) the United States would be required to pay interest only during its unsuccessful appeal to the Supreme Court."

c. Petitioner argues that the court of appeals' interpretation is incorrect because it renders Section 1961(c)(2) superfluous. Pet. 14. According to petitioner, it is an immutable rule of statutory construction that no provision may be construed to be redundant. Pet. 15. There is, however, no such absolute rule. See *Lamie* v. *United States Trustee*, 540 U.S. 526, 536 (2004); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). Congress sometimes makes doubly sure that its intent will be given effect. Indeed, as the court of appeals explained, Section 1961(c) contains other redundancies. For example, subsection (c)(3) specifies that interest shall be allowed "only as provided in paragraph (1) of this subsection or in any other provision of law." 28 U.S.C. 1961(c)(3). And subsection (4) states that "[t]his section shall not be construed to affect the interest on any judgment of any court not specified in this section." 28 U.S.C. 1961(c)(4). Neither of those provisions adds a limitation on the scope of Section 1961 that would not have otherwise existed. Similarly, as the court of appeals explained (Pet. App. 16a), rather than "codifying law not provided for elsewhere," Section 1961(c)(2) provides "an overview intended to emphasize and to cross-reference."

Furthermore, the rule disfavoring redundancy at most creates an implication that Section 1961(c) should be interpreted in a different way. Under this Court's sovereign immunity decisions, however, sovereign immunity cannot be waived by implication. Instead, there must be an express and unequivocal waiver. *Shaw*, 478 U.S. at 318. The rule disfavoring redundancy therefore does not undermine the court of appeals' interpretation of Section 1961(c)(2).

Petitioner contends (Pet. 14-15) that the Court's failure to read Section 1961(c)(2) to avoid redundancy conflicts with *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). There is, however, no such conflict. In that case, the Court applied the rule disfavoring redundancy to support its conclusion that a provision of the Bankruptcy Code did *not* constitute a waiver of sovereign immunity. Nothing in the Court's opinion suggests that the preference for avoiding redundancy could support the *opposite* result, namely, a finding of a waiver of sovereign immunity. Nor did the Court suggest that a provision of law can never be redundant.

Petitioner also errs in contending (Pet. 16) that the decision below conflicts with the decisions in *Ortloff* v. *United States*, 335 F.3d 652 (7th Cir. 2003), cert. denied, 540 U.S. 1225 (2004), *Kaffenberger* v. *United States*, 314 F.3d 944 (8th Cir. 2003), and *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), cert. denied, 510 U.S. 1114 (1994). In *Ortloff*, the court relied on the principle disfavoring redundancy to help resolve an ambiguity in an exception to the waiver of sovereign immunity in the Federal Tort Claims Act. 335 F.3d at 657 n.4. In *Kaffenberger*, the court applied the rule disfavoring redundancy to help determine the extent of the government's authority to enter into agreements to

extend the time for filing refund suits. 314 F.3d at 950-953. And in *United Steelworkers*, the court applied the rule disfavoring redundancy to interpret a damages provision.

None of those decisions involved the statutory scheme at issue here or any other analogous statutory scheme. Moreover, none of those decisions suggests that there is some rigid and invariable rule that requires a waiver of sovereign immunity to be interpreted broadly to avoid redundancy, without regard to the background or context of the waiver. There is therefore no conflict between the decision below and those decisions.

2. Finally, petitioner challenges the court of appeals' conclusion that because Congress has only appropriated funds to pay Federal Circuit judgments affirmed by this Court after review on petition of the United States, the waiver of sovereign immunity should be construed to cover only those judgments. Pet. 17-25. The court of appeals' interpretation of Section 1961(c)(2), however, does not depend on that rationale. Instead, the court merely pointed to the scope of Congress's appropriation as an additional argument in support of its interpretation. Pet. App. 17a. Because that argument is not necessary to the decision below, petitioner's attack on it provides no basis for review.

In any event, petitioner's challenge is without merit. Petitioner accuses the court of appeals of concluding that Congress cannot waive sovereign immunity without also appropriating funds to pay a resulting judgment. Pet. 21. But that is not what the court of appeals concluded. Instead, it concluded that because Congress specifically tied together its waiver of immunity with the appropriations statute through a specific cross-re-

ference to 31 U.S.C. 1304(b), it is plausible to construe that waiver to encompass only the cases for which Congress has appropriated funds to pay a judgment. Pet. App. 17a-19a, 22a.

None of the cases cited by petitioner holds that, when a waiver of sovereign immunity incorporates the terms of the Judgment Fund statute by reference, its scope may not be construed in a manner that is consistent with those terms. The plurality in *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-571 (1962) (plurality opinion), merely recognized that the absence of an appropriation to pay judgments of the Court of Claims did not foreclose that court from exercising Article III judicial powers. *Trout* v. *Garrett*, 891 F.2d 332, 334 (D.C. Cir. 1989), and *Rosenfeld* v. *United States*, 859 F.2d 717, 723 (9th Cir. 1988), held that two other statutes waiving immunity are not limited by the Judgment Fund statute. But as the court of appeals explained (Pet. App. 22a), neither of those cases conflicts with the court's analysis in this case because the statutes at issue in those cases did not contain a cross-reference to the Judgment Fund statute.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2005

(3)

Supreme Court, U.S.
FILED
APR 18 2005
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No. 04-923

IN THE

# Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
*Petitioner*,

v.

THE UNITED STATES,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITIONER'S REPLY BRIEF

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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## INTRODUCTION

The government says that there is no split implicated in this case because no court has interpreted the precise statute at issue here—28 U.S.C. § 1961(c)(2)—in a manner contrary to the Federal Circuit's opinion below. There is a very good reason for this: the Federal Circuit has *exclusive* appellate jurisdiction to hear virtually every suit based on § 1961(c)(2) because the Court of Federal Claims has *exclusive* jurisdiction to hear all but the most miniscule suits for money against the United States. See *id.* § 1346(a)(2). As Mobil Exploration & Producing Southeast, Inc. (MOEPSI) noted in its petition, the Federal Circuit's exclusive jurisdiction to hear certain cases against the government—rather than providing a basis to deny certiorari—has always provided an affirmative basis for this Court to grant review. Pet. 3-4, 11. Unless the Federal Circuit chooses to reconsider its holding in this case in some future case, there may never again be another opportunity for this Court to resolve the meaning of § 1961(c)(2).

Moreover, the government does not dispute that the Federal Circuit's opinion *does* conflict with other courts of appeals on important general questions regarding the proper interpretation of waivers of sovereign immunity. Two courts of appeals have held that a waiver of sovereign immunity is not ambiguous if there is only one reading of the statute that does not render the statute superfluous. Nor does the government dispute that, in this case, there is only one reading of § 1961(c)(2) that does not render that provision superfluous. Had the Federal Circuit followed the approach of the other courts of appeals, it would have found that § 1961(c)(2) unambiguously waives the government's immunity from this suit.

Finally, the government asks this Court to overlook the Federal Circuit's second holding—that a waiver of sovereign immunity is not valid unless money has already been

appropriated to pay any judgment that might arise from the waiver—on the ground that it is only an alternative holding. Although this is true, it provides even more reason for this Court to review this case. The Federal Circuit's alternative holding upsets 150 years of litigating practice against the government, as well as implicates a clear 2-2 circuit split. This is not, in other words, a case where a correct or splitless alternative holding would insulate a lower court's opinion from this Court's review. Rather, both holdings in this case are incorrect, implicate circuit splits, and provide sufficient bases for this Court's review.

## ARGUMENT

### I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY OTHER COURTS OF APPEALS HOLDING THAT A STATUTORY WAIVER OF SOVEREIGN IMMUNITY IS NOT AMBIGUOUS IF THE COMPETING READING RENDERS LANGUAGE SUPERFLUOUS.

The government admits that the Federal Circuit's interpretation of § 1961(c)(2) renders every single word in that provision superfluous. Indeed, the government says that Congress enacted § 1961(c)(2) because it wanted to be "doubly sure that its intent [would] be given effect." Opp. 9.

In defending the decision below, the government does not dispute that the Federal Circuit's holding, and the reasoning behind it, is in direct conflict with that of two other courts of appeals. Specifically, both the Seventh and Eighth Circuits have held that a waiver of sovereign immunity is unambiguous if the competing reading of the statute renders language superfluous. See *Ortloff* v. *United States*, 335 F.3d 652, 659 (7th Cir. 2003) (finding unambiguous waiver of sovereign immunity because government's competing interpretation "would render superfluous" statutory language), *cert. denied*, 540 U.S. 1225 (2004); *Kaffenberger* v. *United*

*States*, 314 F.3d 944, 953 (8th Cir. 2003) (finding unambiguous waiver of sovereign immunity because government's competing interpretation "renders the above quoted portion of [the statute] insignificant, if not wholly superfluous" (internal quotation marks omitted)).

The government's only response to this 2-1 conflict is to note that the other decisions did not "involve[] the statutory scheme at issue here," Opp. 11. As noted above, however, this argument does not militate against this Court's review because the Federal Circuit has exclusive jurisdiction over suits based on § 1961(c)(2) in all but the most improbable cases. The government does not respond to—let alone dispute—this point.

Moreover, the Federal Circuit's holding also conflicts with this Court's teaching in *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). In that case, this Court rejected as implausible one possible interpretation of a waiver of sovereign immunity because it "violate[d] the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *Id.* at 36. The government argues that *Nordic Village* is inapposite because in that case the superfluous reading was in favor of the waiver of immunity, whereas in this case the superfluous reading is against the waiver. Opp. 10. But this is a distinction without a difference. The question here is whether the Federal Circuit's competing interpretation of § 1961(c)(2) is plausible—if it is not, then § 1961(c)(2) is not ambiguous. See *Nordic Village*, 503 U.S. at 37. This Court's point in *Nordic Village* was that a superfluous reading is *not* a plausible one. Thus, the Federal Circuit's conclusion otherwise clearly conflicts with the reasoning of *Nordic Village*.[1]

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[1] The government repeats the Federal Circuit's contention that it is plausible to read § 1961(c)(2) in a manner that renders it superfluous because other sections of § 1961 are superfluous. Opp. 9. The

In any event, the Federal Circuit's conclusion that the government's reading of § 1961 is plausible is plainly wrong even apart from the fact that it reads that provision out of the U.S. Code. The government argues that the language in § 1961(b) that says "except as provided in section 2516(b) . . . and section 1304(b)" limits the authorization of interest on "all final judgments" of the Federal Circuit in § 1961(c)(2) to only the small set subset of Federal Circuit judgments referenced in §§ 2516(b) and 1304(b)—judgments affirmed by this Court on a petition for writ of certiorari filed by the government. Opp. 8. But this is not a plausible reading of the word "except." The presence of the word "except" in subsection (b) must mean that there is content to subsection (b) *outside* the class of cases referenced by the "except" clause. That is, subsection (b) must refer to cases other than those referenced by sections 2516(b) and 1304(b).[2] The government reads the word "except" in subsection (b) to mean that interest shall be authorized "only" as already provided in sections 2516(b) and 1304(b). See Opp. 5 ("Section 1961(c)(2) waives immunity *only* . . . on judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States . . . ." (emphasis added)). But, of course, as Judge Prost noted in dissent, this

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government does not respond, however, to MOEPSI's argument that these other purported superfluities codify judge-made rules—rather than other provisions of the U.S. Code—and, therefore, are not provisions for which it would have been redundant for Congress to have enacted. *See* Pet. 17 & n.8.

[2] The government suggests that the "except" clause might be read to refer to "the only category of cases in which interest is authorized against the United States, leaving the daily computation rule to operate in non-government cases." Opp. 8. This theory—that the "except" clause refers to all of the provisions on which interest has been authorized against the government—is plainly wrong. There are any number of other statutory provisions besides the ones referenced in § 1961(b) that authorize interest on judgments against the government. *See, e.g.*, 5 U.S.C. §5596(b)(2); 28 U.S.C. § 2412(f); 31 U.S.C. § 3728(c); 41 U.S.C. § 611; 42 U.S.C. § 1395oo(f)(2); *id.* § 2000e-16(d); *id.* § 9606(b)(2).

is the very *opposite* of the meaning of "except." Pet. App. 31a ("The majority's . . . reading of the statute effectively requires amending 'except as provided in' to read 'subject to.'"). Thus, the government's reading of the statute is implausible even apart from the fact that, in order to accept it, the Federal Circuit had to read § 1961(c)(2) entirely out of the U.S. Code.[3]

The government tries to defend its interpretation by arguing that there is no evidence in the legislative history to support MOEPSI's reading of the statute. Opp. 6 ("There is no evidence that Congress affirmatively sought to effect that kind of dramatic expansion of the monetary liability of the United States."). The responses to this effort are twofold.

First, it is not in accordance with any principle of statutory interpretation that has the support of this Court to *require* legislative history to *corroborate* the plain meaning of the text of an Act of Congress. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385, n.2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). To do so, of course, puts the inquiry exactly backwards. If the text is unambiguous, this Court interprets the statute in that manner, regardless of whether there is no legislative history to corroborate that reading, and, indeed, even if there is legislative history to the contrary. See *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry

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[3] The government asserts that the Federal Circuit's reading of the statute is "consistent with decisions of other circuits," Opp. 8, but this is not true. In *Transco Leasing Corp.* v. *United States*, 992 F.2d 552 (5th Cir. 1993), the court was considering a claim for interest from a *district court* judgment under § 1961(a), and, therefore, not only made no holding with respect to § 1961(c)(2), but actually *allowed* the claim for interest. Similarly, in *Thompson* v. *Kennickell*, 797 F.2d 1015 (D.C. Cir. 1986), the court was considering only a claim for interest from a district court judgment under § 1961(a).

begins with the statutory text, and ends there as well if the text is unambiguous."). As Judge Prost put it in dissent, "[t]o deny a clear statute its force based on the absence of legislative history would be an example of the tail wagging the dog." Pet. App. 32a.

Second, this is all the more true in the context presented here, which is an interpretation of a statute waiving sovereign immunity. Any waiver of sovereign immunity must be unambiguous. See, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986). At the same time, legislative history is not consulted by this Court unless a statute is already ambiguous. See, e.g., *BedRoc Ltd.*, 541 U.S. at 183. Thus, as this Court has held, legislative history is irrelevant to the interpretation of a waiver of sovereign immunity. See, *e.g.*, *Nordic Village*, 503 U.S. at 37 ("Contrary to respondent's suggestion, legislative history has no bearing on the ambiguity point.").[4]

This Court should grant the petition and reverse the Federal Circuit. The Federal Circuit's decision in this case was wrong, and it conflicts with two other courts of appeals. The

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[4] It should also be noted that the government's reading of the legislative history is not the only one. To begin with, the government's reading is based entirely on the views of one Senator who said he wished to keep the "'status quo'" in enacting the Federal Courts Improvement Act of 1982 (FCIA). Opp. 7. Of course, the intentions of one member of Congress are not reflective of the intentions of the other 534 members, not to mention the intentions of the President when he signed the FCIA. *See Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). Moreover, it is clear that Senator Grassley did not mean that the FCIA would retain the "status quo" on post-judgment interest in all cases because the FCIA undeniably altered the authorization of post-judgment interest in other cases besides the situation at issue here. For example, the Act repealed Title 28, Section 2411(b), which had authorized interest on Court of Claims judgments in Little Tucker Act and Federal Tort Claims Act cases. *See Thompson*, 797 F.2d at 1019.

only reason it did not open a conflict with regard to the specific statute at issue here is because the Federal Circuit has virtually exclusive jurisdiction to hear suits based on § 1961(c)(2).

## II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY OTHER COURTS OF APPEALS HOLDING THAT AN APPROPRIATION IS NOT NECESSARY IN ORDER FOR CONGRESS TO WAIVE THE GOVERNMENT'S IMMUNITY.

The government argues that the Federal Circuit's alternative holding "is not necessary to the decision below" and, therefore, "provides no basis for review." Opp. 11. The government is correct in observing that this Court often declines to review erroneous initial holdings that implicate circuit splits when the overall judgment of the court below is insulated by an alternative holding that is either correct or is not implicated in a split. This is not the case here. In this case, the Federal Circuit's alternative holding is clearly wrong and implicates a 2-2 circuit split in its own right. See Pet. 18-25.

The government does not deny that the Federal Circuit's holding that "[t]here can be no unequivocal waiver of sovereign immunity for post-judgment interest . . . if Congress has not clearly appropriated funds with which the government can pay the interest," Pet. App. 17a, not only disrupts 150 years of practice against the government, but also conflicts with explicit holdings of two other courts of appeals and a plurality decision of this Court.

Instead, the government argues that the Federal Circuit's holding can be salvaged because, in this particular case, the statutory waiver of sovereign immunity "incorporates the terms of the Judgment Fund statute by reference." Opp. 12. The government does not respond, however, to what MOEPSI pointed out in the petition: the provision of the Judgment

Fund statute that is incorporated by reference in § 1961—namely, § 1304(b)—is a provision that has *nothing* to do with the Federal Circuit judgment in this case. Pet. 23-24. Section 1304(b) simply says that *if* interest is sought "on a judgment of the Court of Appeals for the Federal Circuit . . . under section 2516(b)," *then* the appropriation in §1304(a) must be paid on interest over a more limited period of time. 31 U.S.C. § 1304(b)(1)(B). Section 1304(b) says nothing about the appropriation in cases that do not arise under § 2516(b)—*e.g.*, judgments of the Federal Circuit, like this one, that were not affirmed by this Court on a petition by the government. Thus, the cross reference to § 1304(b) in § 1961(b) is entirely beside the point. Moreover, it bears repeating that the cross reference to § 1304(b) in § 1961(b) is an *exception* to the computation rule that otherwise applies for interest on Federal Circuit judgments. See 28 U.S.C. § 1961(b). Thus, the cross reference is only relevant in one of the exceptional cases, of which, again, this is not one.

Once the red herring of the cross reference is put to one side, it is clear—and the government does not dispute this—that the Federal Circuit's alternative holding is in conflict with two other courts of appeals—including one decision authored by then-Judge Ginsburg—creating a 2-2 split on this question. See *Trout* v. *Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("We find no tenable support for the notion that Congress designed the judgment fund measure to retract or limit duly enacted waivers of sovereign immunity . . . ."); *Rosenfeld* v. *United States*, 859 F.2d 717, 726-27 (9th Cir. 1988) ("The Judgment Fund statute is not a superseding limitation on the government's waiver of sovereign immunity."). Nor can the government dispute that the Federal Circuit's alternative holding conflicts with a plurality decision of this Court. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-71 (1962) (plurality) (deciding that lack of an appropriation did not alter otherwise valid waiver of sovereign immunity because the "good faith of the United

States" usually ensured that any judgment would eventually get paid).

This Court should grant the petition and resolve these conflicts.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 18, 2005

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